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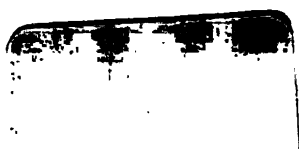
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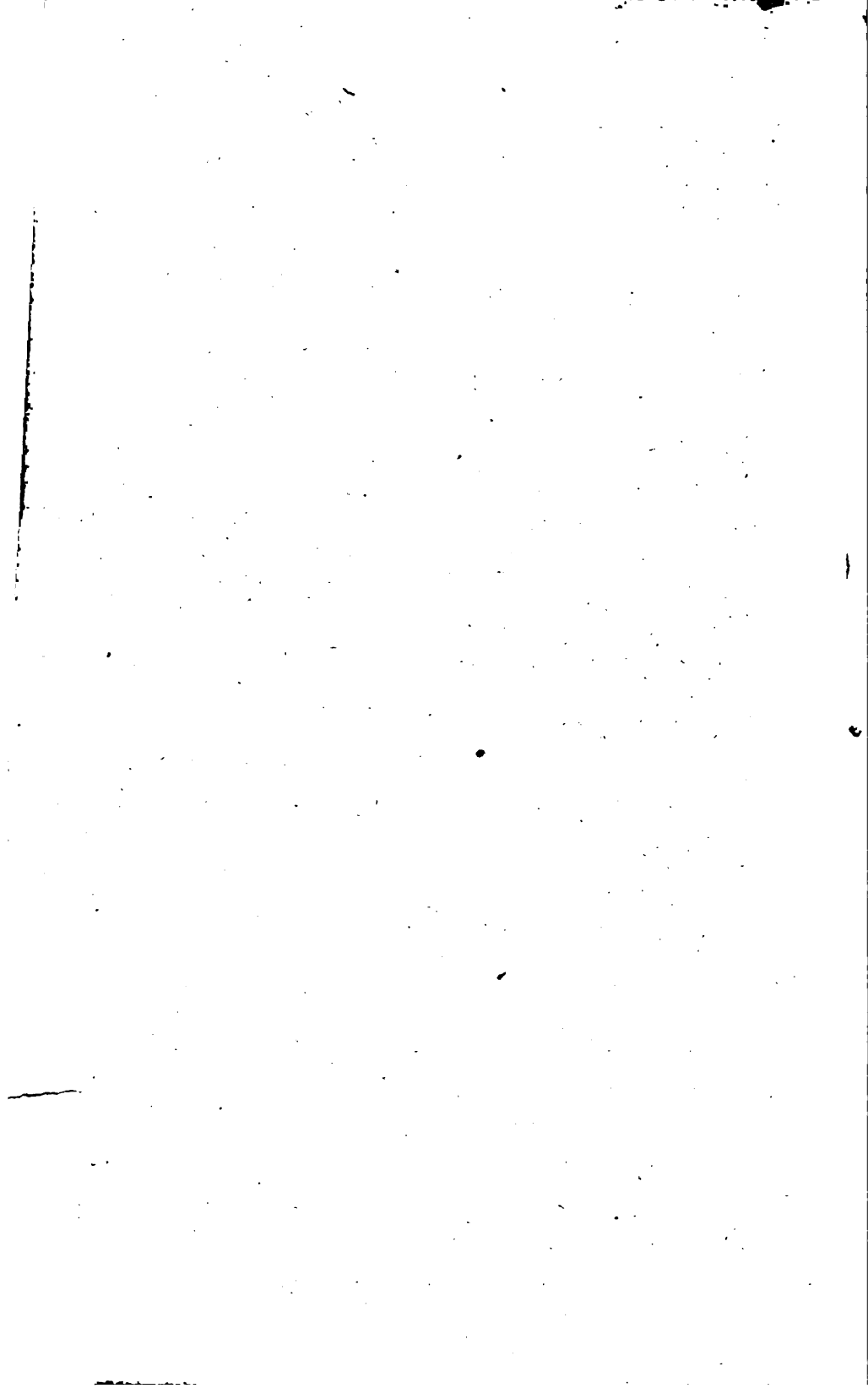
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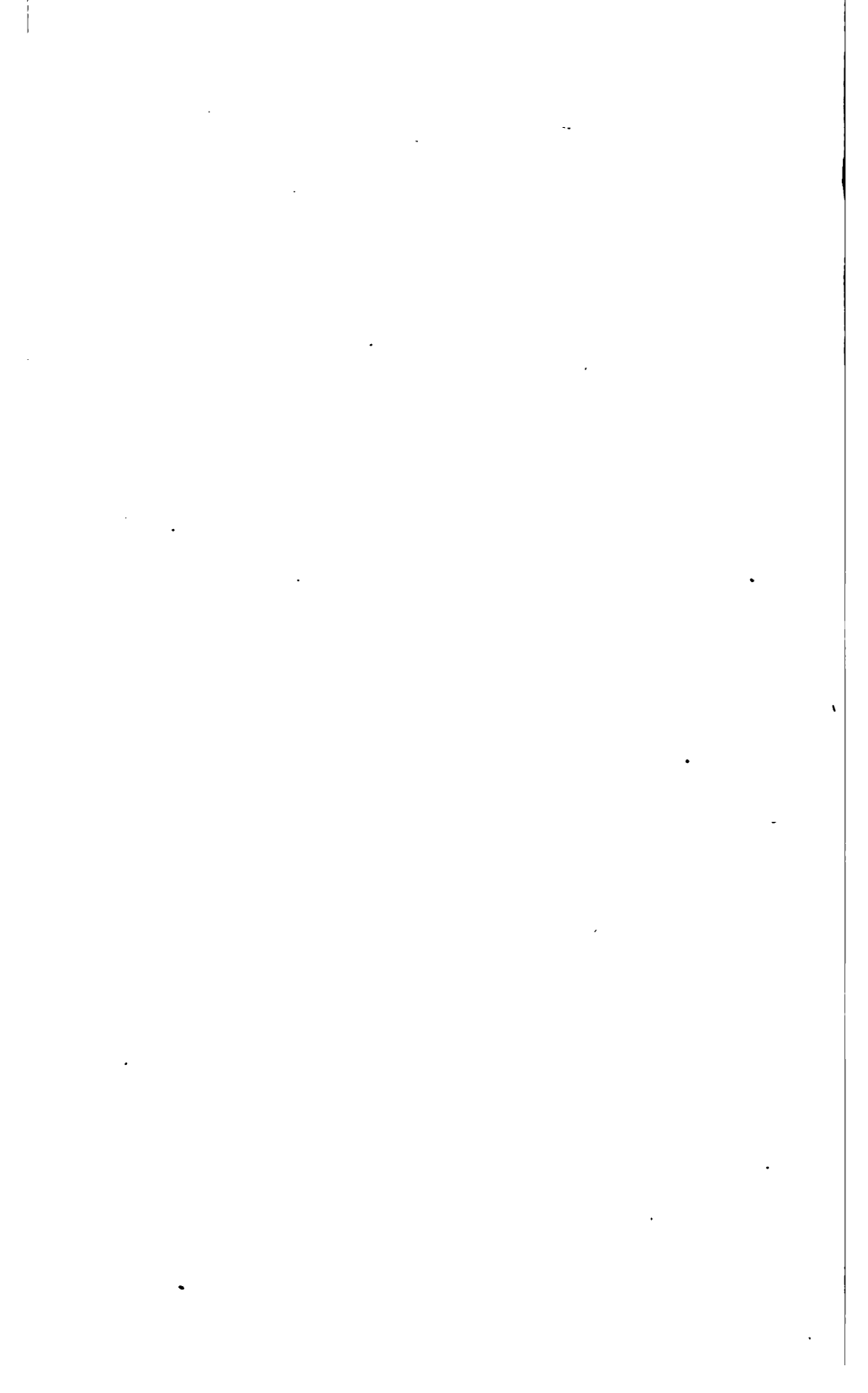








C. T. Kerr



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FRANK T. REID, ----- EDITOR.

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T H E

SOUTHERN LAW REVIEW.

VOL. II.] NASHVILLE, JANUARY, 1873. [No. I.

English and French Law.

NUMBER ONE.

THE enforced leisure of a prolonged trip to Europe led the writer to make some notes in relation to the judicial systems of England and France during the years 1863-4, the judges and lawyers, the modes of legal procedure, and the causes celebres of the period. It may be that some of these notes may instruct the younger members of the profession, and some of them amuse the reader. They are presented as they were made, and may, in some respects, appear a little antiquated, in view of recent events. To recast them, however, would be to destroy their verisimilitude, and take away what little life they may possess. If the reader can fancy Lord Palmerston alive and wielding the destinies of England; if he can imagine Napoleon III on the throne of France, and apparently the mightiest monarch of Europe; if he can picture Bismarck as planning the absorption of Schlesweig-Holstein and the conquest of the German democrats; if he can think of the venerable Pontiff of Rome as contemplating the enunciation of a new dogma of faith, and uttering an orthodox Bull against the errors and evils of human progress; if he can call up the "blood-boltered ghost" of the late tremendous unpleasantness, he will appreciate the period as anything but a common one, and that a spectator would find it rather dull to turn from such stirring panoramas to the "Hall of the Lost Footsteps" of Paris, and the narrow precincts of Lincoln's Inn, or the dingy courts of Westminster. The force of habit was more powerful than the ways of the hour, and many of the writer's pleasantest days were

spent in gathering legal lore from under the square caps of the French advocates, and the ridiculous wigs of the English judges and lawyers. The caps, the wigs, and the gowns, were soon lost sight of in the brilliant displays of forensic debate, and the luminous expositions of legal principles from the Bench.

A careful historic survey of the English and French systems of law, in their parallelisms and their divergencies at various periods, would be curious and interesting. There can be no doubt that they were very much the same first under the Roman domination, and again under the Feudal system. We have, in a late number of this REVIEW, traced the civil law through its various stages until it culminated in the Codes of Justinian. No doubt the benefits of the existing system were carried with the conquering legions to the western ocean, to be, after the lapse of ages, replaced by another better adapted for the time to the rude tribes by whom the old Italian civilization had been overwhelmed.

The courts in which feudal justice was administered were presided over by the feudal chiefs, but were composed of their vassals who exercised jurisdiction with their Lords. Each barony had two courts for the trial of civil causes, the court-baron at which the freeholders attended, and the copyhold court of the customary tenants. There was a third court, the court-leet, for criminal and police cases, which was attended by all the inhabitants. The proceedings in this court were in the nature of a grand inquisition, the people not only finding presentments against offenders, but acquitting or convicting the persons charged upon evidence of their own body. In process of time, the general attendance of all the inhabitants became irksome or impossible, and the usage was adopted of calling together only a select number from the body of the country, and these were the jurors who first acted upon their own knowledge, afterwards upon other evidence, and whose powers gradually died away, except in England. Subsequently, as the authority of the Crown increased, courts of high or general jurisdiction were established by the Sovereign for the supervision of the baronial courts, an appeal lying to the King in Parliament. These courts were at first temporary and ambulatory, appointed for special purposes and particular localities. The proceedings of one of these high commissions have been graphically delineated by the pen of one who afterwards became distinguished in the Catholic church. *Les Grands Jours D'Auvergne*, of Flechier, is a legal curiosity, and gives us a singular insight into provincial French manners during the reign of Louis XIV, and

shows us how necessary such commissions were for the repression of abuses. The power of the judicial parliaments continued in France until the revolution, an event in the end as beneficial in the legal as in the political world. Before the revolution, France was split up into provinces, each with its own laws, usages and customs, which defied the wit of Montesquieu, the wisdom of D'Aguesseau, and the erudition of Pothier to harmonize. It required an Imperial innovator, a modern Justinian, to replace them by a Code.

William the Conqueror created the courts of Superior Jurisdiction of Westminster upon the model, no doubt, of the continental usages; and Henry II, a hundred years after, established the circuits into which England is still divided, the judges going around them at first occasionally, in later ages twice a year, to try all civil and criminal causes. In theory, Parliament had original as well as supervisory jurisdiction over all suits, except in matters ecclesiastical, which the clergy determined with appeal to Rome. In theory, the appellate jurisdiction was supposed to reside in Parliament as a body, but it has been gradually confined, in practice, to one House, and now to only the law Lords of that House. Justices of the peace are said to have been created by Edward III, in 1327.

The forms of procedure, the character of the evidence, and the general principles of law, were, in the beginning, very nearly the same in England and France. But the Roman law seems to have modified the French usages and customs at an earlier period, and far more extensively than the local law of England. In both nations, however, the amelioration was wonderfully slow, and some of the relics of barbarism survived even to the present century. One would imagine that the interval between the proof by hot iron, boiling water, and judicial combat, with all their attendant barbarisms, and proof by witnesses, no longer under the fear of being called upon to sustain their evidence by walking over burning plough-shares, or combatting a hired bravo in the lists, would be counted by several centuries. Yet we know that one branch of the law of legal duel was suffered to linger in England until 1819, and civilized Europe was threatened at that date with the spectacle of the Court of King's Bench presiding over a literal combat of litigants, like bottle-holders at a boxing match. Fortunately, the appellant concluded that discretion was the better part of valor, and the case was permitted to pass out of notice. In the same great nation, criminals have been allowed, only within the memory of the living, the benefit of counsel, and the right of enforcing the attendance of witnesses on their

behalf, and of having their evidence under oath. And in France, up to near the close of the last century, all criminal proceedings were conducted with closed doors, and might be accompanied by torture. Even now, as will be shown presently, the preliminary investigations and examinations of the prisoner, upon which his fate in a great measure depend, are conducted with profound secrecy, the prisoner being often, during the time, debarred from all intercourse with his friends, and all assistance of counsel.

The remarks of Montesquieu upon the strange anomalies of feudal jurisprudence are strikingly applicable to anomalies which still exist, and enable us to understand how the former were borne with so long. His discussion of these anomalies is one of the most curious and entertaining parts of his great work, which, if it be amenable to the charge of Voltaire that it is not always truthful, nor everywhere profound, certainly sparkles all over with wit and brilliant thought. "Men," he says, "reasonable at bottom, subject even their prejudices to fixed rules. Nothing could be more contrary to good sense than judicial combat; but the point once admitted, a certain prudence controlled its execution," as he proceeds to point out: *Esprit des Loix*, L. xxviii, ch. xxiii. "As there are," he adds, "an infinity of wise things conducted in a very foolish manner, so there are foolish affairs conducted in a wise manner:" *Id.*, ch. xxv. "I say, then," he elsewhere remarks, "that under the circumstances of the times, when proof by combat, and proof by hot iron and boiling water were in use, there was such an accord between the laws and the manners that the laws produced less injustice than they were themselves unjust; that the consequences were more innocent than the causes; that they shocked more the sense of justice than they violated rights; that they were more unreasonable than tyrannical:" *Id.*, ch. xvi.

The slower progress of change in the English than in the French law, is due to the characteristic difference between the Anglo-Saxon and Franco-Gallic minds. The latter is fonder of novelty and innovation, and is apt to run off upon an idea, and to insist upon carrying it out to all its logical sequences, regardless of consequences. The former adopts an idea slowly, and moulds it to existing circumstances, regardless of apparent, or even real anomalies. The French mind delights in theory, without much reference to actual facts, a proclivity noticed by Mr. DeTocqueville in almost the only passage in his profound work on Democracy in America, which borders upon humor. "Every morning when I wake up," is the substance of his

remark, "some friend comes running to me with a new theory of morals or of government, which upsets the existing state of affairs, and remodels them on a new, and, in the opinion of my friend, perfect basis, which must at once meet the approval of all men, and be the starting point of a charming millenium. And my friend," he adds, "is ready to adopt any measure, however extreme, to force so beneficent a scheme upon a reluctant public." "The soul," says Montesquieu, in reference to the same peculiarity of his countrymen, "feels such delight in controlling other souls. Those who love the right, love it so strongly that there is no person who is not so unfortunate as to have occasion sometimes to mistrust his own good intentions; and in truth, our actions depend so much upon circumstances that it is a thousand times easier to do right than to do it rightly." The true English intellect shuns extremes, and is apt to err by excess of caution.

Nevertheless, great and beneficial changes have of late years been wrought in the English law, and in the cumbrous machinery of the English courts. These changes have been directed primarily to bring the law itself up to the level of modern thought, and to simplify its administration. The jurisdictional distinctions between the superior courts of law have been nearly obliterated, and the proceedings made uniform. Chancery business has been systematized, and the progress of litigation greatly facilitated. The Courts of Queen's Bench and Common Pleas consist each of a Chief Justice and four puisne judges; the Court of Exchequer of a Chief Baron, and four associate barons. There are, therefore, fifteen judges of the superior courts of law. They have equal and concurrent jurisdiction of all matters, civil and criminal, at *Nisi Prius*, and upon writ of error *in banc*, the Court of Queen's Bench being still the general supervisor of inferior tribunals. The judges go the circuit twice a year, arranging among themselves the particular circuit each is to travel. One judge of each court is also generally engaged in trying jury cases in the city of London, and another is often delegated to hear motions at Chambers. Each court holds four sessions a year, of about three weeks each, at Westminster, *in banc*, for the disposition of writs of error, motions for new trial, and other applications that properly come before them. If the court *in banc* is divided in opinion, an appeal lies to the Court of Exchequer Chamber, composed of the fifteen judges, or a majority of them; and from their decision, as a general rule, an appeal lies to the House of Lords. If the judges *in banc* are unanimous in sustaining the rul-

ing or action at Nisi Prius, it is discretionary with them to allow, or refuse the appeal to the Exchequer Chamber; but the discretion is rarely exercised against the right, except in cases where the amount in controversy is small.

The Lord Chancellor still retains in theory, all the jurisdiction which has been handed down to him, but in practice he rarely ever acts except in cases of appeal, and even this appellate jurisdiction is now divided between him and a court composed of himself and two Lords Justices in Chancery, or any two of the three. Original equity jurisdiction is usually exercised by the Master of the Rolls and two Vice-Chancellors, each having equal and concurrent power. If business accumulates in one of these courts, the Lord Chancellor has the right to transfer specified cases to the other courts. An appeal lies from the decisions of the Lord Chancellor's, or the Lord Justices' Court, to the House of Lords.

A new court has recently been created, and a Judge appointed to preside over it, to hear and dispose of divorce cases. An appeal lies from this court to a court composed, if my recollection serves me, of the Lord Chancellor, the Judge of the Prerogative Court, and one at least of the common law judges. A further appeal, probably, also lies in proper cases, to the House of Lords.

There are, of course, as of yore, courts of Admiralty and Probate, Commissioners in Bankruptcy, and municipal courts for the despatch of criminal business. The county courts, composed of local magistrates, hold also quarterly sessions, and are now vested with power to dispose of civil cases of a particular character and limited amount in addition to the common law jurisdiction heretofore exercised by them.

The judiciary system of France is very complete, and admirably adapted to effect the ends of justice among a people with the characteristics of the French. The independence of the judiciary is secured by the tenure of the office of Judge for life, except upon good cause shown. But this law fixes the age of seventy-five years for the Judges of the Court of Cassation, and seventy years for the judges of the inferior courts, as the period at which the incumbent may be required to retire upon a salary. The French law aims more to prevent crime, and even to prevent litigation between individuals, than the English, as well as to hasten the term of litigation once commenced. The civil code provides that no suit shall be instituted until the complaining party has first summoned his adversary before a magistrate, whose duty it is to effect an amicable adjustment, and

to reduce the agreement arrived at to writing, and to see that it is formally executed. This rule is subject to the exception of cases which require, in the opinion of the magistrate, immediate action, and those in which the defendant resides out of the canton where the suit is legally brought. In addition to this general provision of the law, the Tribunals of Commerce, and of Prud'hommes, to be spoken of presently, are admirably adapted to the same end. Far the larger number of cases brought before these domestic tribunals are disposed of by conciliation, or in the way of arbitration, and never come before the regular courts.

The primary magistrates, Justices of the Peace, are appointed by the Emperor, and have original jurisdiction, without appeal, of all civil actions in which the amount in controversy does not exceed one hundred francs (about twenty dollars); and, with right of appeal, of all personal actions, to the amount of two hundred francs; and of actions between landlord and tenant, or touching the right to the possession of realty; and between hotel keepers and travelers; and in the matter of pawns and pledges, to the extent of fifteen hundred francs. The appeal, when allowed, is to the courts of First Instance.

The council of Prud'hommes (prudent or substantial men) is composed of an equal number of masters and foremen of certain trades, chosen by their fellows. To be qualified to vote for such officers, the elector must be twenty-five years of age, of five years standing in trade, and of three years residence within the jurisdiction of the Council. An elector to be eligible to the Council itself, must be thirty years of age. One half of the Council is renewed every second year. The Presidents and Vice-Presidents are nominated for three years by the Emperor, and may be selected from persons not eligible as members. These Councils are called upon to decide difficulties between the employers and the employees of particular trades, or between several employers, or between the employees themselves. The questions which most frequently come before them relate to wages, hours of labor, condition of children working in the trades or factories, apprenticeship, the counterfeiting of trade-marks, and the like, and are often of great importance. The decisions are controlled by the usages of trade, are promptly made, and, in the majority of cases, satisfactory to the parties. An appeal lies to the Tribunals of Commerce whenever the sum in controversy exceeds two hundred francs.

The Tribunals of Commerce are composed of the heads of mercantile houses, elected for two years, in an assembly of the leading mer-

chants of the District. The list of these merchants is drawn up by the Prefect of the City in which the Tribunal is located, and approved by the Minister of the Interior. It can not consist of less than twenty-five members in a town of fifteen thousand inhabitants, and one member for each additional thousand, in the larger cities. No one is eligible to these Tribunals unless he has attained the age of thirty years, and has been a merchant of at least five years standing. The jurisdiction of these Tribunals extends to all matters relating to the engagements and transactions between traders, merchants and bankers; to all differences between partners growing out of a commercial partnership, and to all disputes between any class of persons relating to acts of commerce. And the Commercial Code (sections 632, 633,) defines what are "acts of commerce" almost as broadly as Judge Story defined "contracts" over which courts of admiralty would take jurisdiction. These Tribunals have also cognizance of matters of bankruptcy. Their judgment is final in all cases in which the parties agree beforehand that there shall be no appeal, and in all cases in which the amount in controversy does not exceed fifteen hundred francs. In all other cases, an appeal lies to the Imperial Courts, next above those of First Instance.

The Courts of First Instance have original jurisdiction of all civil causes, the original jurisdiction of which is not exclusively assigned to Justices of the Peace, the Tribunals of Prud'hommes, or those of Commerce. They have appellate jurisdiction in all cases of appeal allowed from the judgments of Justices of the Peace. There is a Court of First Instance for every Commune in France, composed of from three to eight Judges, according to population. The decision of these courts is final when the amount in controversy does not exceed fifteen hundred francs, and in real actions where the rent of the realty is not more than sixty francs per annum. The appeal, when allowed, is to the Imperial Courts.

There are twenty-seven Imperial Courts for the whole Empire, or, as they were originally and are now sometimes called, Courts of Appeal. They have jurisdiction of appeals from the Tribunals of Commerce and Courts of First Instance. The effect of such appeals is to give the party a right to a trial *de novo*, like our own appeal from Justices of the Peace. The courts are each composed of from twenty to forty Judges, according to the population of the department over which it presides. No judgment can be rendered by less than seven Judges. If the Judges, as must often happen where there are so many heads, are divided in their opinions into more than two classes,

the class or classes composed of the smallest number of Judges must yield their opinions and unite with one of the two opinions arrived at by the larger number of Judges. If the number of Judges happens to be even, and they are equally divided, other Judges must be at once called in, and the cause re-argued. If the judgment appealed from is affirmed, its execution belongs to the tribunal from which the appeal was taken. But if reversed, the execution of the new judgment appertains to the Appellate Court, or to such other tribunal as that court may determine in the judgment itself. When the appeal is from an interlocutory order which is reversed, the court may, if the cause is in a condition to be finally disposed of, decide it upon the merits without remanding. The same rule applies when a final judgment of the inferior court is reversed for a substantial defect of form, or other cause not reaching the merits. An interlocutory order which may be appealed from, is where the inferior tribunal, before final judgment, orders a proof, verification, or information which pre-judges the merits. No appeal lies from a mere preparatory order—that is, an order “*pour l’instruction de la cause,*” merely designed to prepare the cause for final judgment.

Besides the jurisdiction of the Imperial Courts in civil causes, they also entertain appeals from Police Courts; and a chamber of the court, selected by the Minister of Justice, under the name of the Court of Assize, has cognizance of all crimes of the grade of felony, or entailing heavy punishment. In these criminal cases of a high grade, and these only, is the trial by jury known in France. There is no such institution as our Grand Jury, but its place is supplied by the court itself. Whenever a criminal cause is referred to the Imperial Court, one of its chambers, always composed of several Judges, hears the charge in private session, and deliberates upon it. If the charge seems to them not well founded they dismiss it, otherwise they direct the person charged to be “*mise en accusation,*” which is equivalent to the finding of a true bill. The duty of the Court of Assize, after the accused is ordered to be prosecuted, is not passive, as in England and America, but active to discover the facts. One of the Judges, and more than one if the case seems to require it, is, or are, deputed to investigate the facts, to take the examination of the witnesses, and to interrogate the prisoner, which may be done as often as the Judge pleases, and to any extent, so as even to bring out a full narrative of the prisoner’s past life. The Judge goes to work like a detective to ferret out the guilty party, and almost always becomes warmly enlisted against the accused. He is required to keep

an accurate minute of his proceedings, and to reduce the evidence of the witnesses and the examination of the prisoner to writing, and these are read at the trial. But the subject of criminal trials will be considered further on.

There is only one court of last resort for the correction of errors, called the Court of Cassation, and held at Paris. It is composed of a President, three Vice-Presidents, and forty-five Associate Justices. These Judges are divided into three chambers: a Chamber of Requests, a Chamber of Civil Appeals, and a Chamber of Criminal Appeals. An appeal comes first before the Chamber of Requests, where the appellant alone is heard. If that chamber thinks the errors assigned are sufficient to justify the appeal, the cause, according as it may be of a civil or criminal nature, is referred to one of the other chambers for hearing. The only errors which can be assigned are errors of law upon the facts as found by the inferior court, or errors in the forms of the procedure. The Code expressly forbids the court to go into the merits of the case. If the judgment below is affirmed, it is remitted to the court from which it came for execution. If reversed, the cause is sent, not to the court from which the appeal was taken, but to the nearest court thereto of the same grade, to be taken up at the point where the error was committed. The decision of the Appellate Court upon a question of law is not, singularly enough, conclusive upon the court to which it is remanded. That court may disregard the ruling of the Appellate Court, and even adhere to the opinion of the inferior court that first tried the cause. In the event of another appeal of the same cause, between the same parties, and upon the same point of law, the hearing takes place before the whole Court of Cassation, the three chambers uniting for the purpose, and the judgment then come to is conclusive upon the inferior court in that particular case, but not in any other case. It is just here that one of the marked distinctions between the English and French systems is found.

The law of binding precedents in the form of judicial decisions is not only not recognized in France, but the Code expressly prohibits the Judges from pronouncing judgment "*par voie de disposition generale et reglementaire*," (Code, § 5,) that is, by laying down general principles upon which other cases, where the facts are similar, may be disposed of. The reason given for this prohibition is, that, by the Constitution, the law-making and the law-construing power—the Legislative and Judicial Departments of Government—are required to be kept separate and distinct; that to give the courts the power

of deducing general principles from particular enactments of the Legislature, is, in effect, to entrust them with the making of the laws. This is a logical deduction, which the English and American jurists, who live under a system of judicial legislation of the most sweeping character, have never been able to see, whether because the logic is too refined, "unmeet for their ruder powers," as Shakespeare's Trojan hero says of love's "imaginary relish," or because the stern logic of facts, growing out of the character of the legislation of our "lack-learning" parliaments, is too strong for the logic of the schools. Certain it is, that in theory the two systems are here in direct antagonism, but in practice the chasm is not so great as might be supposed, as will be seen presently.

The theory of the French law in question, dates from the Revolution. Under the ancient *regime*, the parliaments, as courts of last resort, being clothed to a certain extent with legislative as well as judicial authority, exercised the power of laying down general rules applicable to all like cases. Under an Act of the Legislative Assembly of 1790, this power was forbidden to the courts, and reserved to that body. It was further, by the act, made the duty of the Legislature to construe a law, after the same point, upon the same state of facts, had been presented the third time to the Court of Cassation. In 1805, under the Imperial *regime*, the construing powers was reserved to the Council of State, upon the ground that the body which initiated a law—the right of initiating all laws being then, as now, reserved to the Council of State—was the best expounder of its meaning. After the Restoration, it was strangely enough provided by the Act of 1828, that after a case had been twice brought before the Court of Cassation upon the same point, and the same facts, it should be finally disposed of by the inferior court to which the cause was remitted, without reference to the ruling of the Court of Cassation. The effect of this statutory provision was to leave the ultimate adjudication of a doubtful point of law not to the highest court of the Empire, but to an inferior tribunal. This strange state of the law continued until 1837, when it was settled, as it now exists, that the second decision of the Court of Cassation, by all the Chambers, should be conclusive in the particular case. During all this time, and up to the re-establishment of the Imperial rule, the Legislature might, in all such cases, *mero motu*, intervene, and by a construing law provide for pending as well as future cases arising under the provisions of a previous statute. Since then, a return to the Imperial *regime*, by which the initiation of all laws is reserved to the Council of State, may be considered as restoring the law of 1805.

Notwithstanding the theory of the French law, and the positive provision of the Code referred to, in actual practice the decisions of the Court of Cassation are cited in the courts, and do control the subsequent decisions. If that court adheres with reasonable uniformity to its own rulings of the law, as it does in reality, the inferior courts are inclined to follow them to save the costs of an appeal, and the parties themselves acquiesce. The conclusion to be deduced in this, as well as in many other instances of apparent antagonistical diversities, is, that, whatever may be our abstract theories, the practical results reached are very much the same, under similar circumstances, under all systems. Men are the same substantially, all the world over; and, to use the words of Montesquieu already quoted, "reasonable at bottom, subject even their prejudices to fixed rules."

From the foregoing summary it will be seen that a large class of controversies among employers and workmen is entrusted, in the first place, to Prud'hommes selected among, and by themselves, from whose decision an appeal lies, in all cases in which the amount in controversy exceeds a certain sum, to the Tribunals of Commerce; that these latter have, in addition, a large original jurisdiction over acts of commerce, with appeal, where the amount justifies it, to the Imperial Courts; that all other matters of civil litigation are left primarily to Justices of the Peace, and to the Courts of First Instance, with appeal, in all cases where the amount in controversy is over a certain sum to the latter, and from the latter, with like qualification, to the Imperial Courts; that the Imperial Courts, in addition to their appellate jurisdiction in civil cases, also have cognizance of criminal charges; and that the Court of Cassation remains in last resort, for the correction of errors of form in the proceedings, and errors of law,

In every civil case of real importance, the litigants are entitled, it will be noticed, to have the matters in controversy passed upon by at least two tribunals, upon all questions of fact, and by three tribunals upon questions of law. Moreover, although there is no jury in civil actions, the constitution of the courts is such as to secure all the benefits of that institution, so far as the litigants themselves are concerned. The distinctive advantages of a jury, considered only in relation to the interests of the litigants, is in having the opinion of twelve of their fellow-citizens upon the facts. Now, all the French courts are composed of a number of judges; and the Imperial courts, upon whom devolves the final decision of facts, is never composed of less than seven, and most frequently of from ten to fifteen members. The litigants, therefore, have a jury in the court.

In order to insure the proper number of judges at all times, a list of "suppleans," supplementary judges, is always made out for each judicial district, from which the necessary judges are taken in the order in which they stand on the list. These "suppleans" are always practicing advocates. But it may so happen that, owing to the absence of some of these advocates, or their being retained in the particular case, or being otherwise professionally engaged, the list may not meet the exigency. In that event the law provides that any advocate of the court may be called to act as judge in the order of seniority; and in the absence of a sufficient number of such advocates, any attorney of the court in like order.

The law sedulously provides for the prompt dispatch of legal business. The appeal up to the Imperial Courts has the effect of carrying up the case for re-trial. The appeal to the Court of Cassation is in the nature of a writ of error. But in both classes of appeals the appeal must be taken in a limited and brief period, not from the rendition of the judgment, but from the notification thereof to the opposite party; the period fixed by law varying from three days to three months, according to the nature of the controversy. The notification is, however, in some instances where minors are concerned, required to be made to them after they come of age. An appeal, in most instances, does not stay execution of the judgment appealed from, and the appellate courts are expressly forbidden to grant a supersedeas. All that they can do is to promptly dispose of the appeal, and this is usually done where the error is obvious, and the danger of execution imminent.

The practitioners in the French courts are divided into advocates and attorneys, but the line of distinction is by no means as rigid as in England. The attorney has, in some cases, the right of appearing as an advocate; and may, as we have seen, be called upon to act as judge. The advocates are, besides, more numerous than the attorneys, and must, consequently, be compelled sometimes to act as their own attorneys.

Notaries are important functionaries in France. They draw up wills, leases, mortgages, title deeds, obligations, marriage settlements, and various other documents required by the law to authenticate the acts of parties, and they also keep registered copies of such of them as are required to be preserved in that form.

It may be added in relation to the courts, that each higher court in France exercises a supervisory jurisdiction over the conduct and proceedings of the inferior courts. The court of Cassation, more-

over, settles all conflicts of jurisdiction between the lower courts, and takes cognizance of charges against judges in the performance of their functions, technically called a "*mise en partie*." Over all the courts, the Minister of Justice has the right of general supervision and reprehension. The judgments of the courts are called "arrets," and must express on their face the grounds on which they are based, not the reasons at length, but the conclusions of fact and law upon which the judgment rests. This must not be done, as we have already seen, by the assertion of general principles, but by specific deductions from the facts of the particular case. Conclusions of fact which require for the ascertainment of their correctness an examination into the merits, can not, as we have seen, be questioned in the Court of Cassation. But if the conclusions of fact recited on the face of the judgment do not cover the whole controversy, or do not justify the final judgment on the rights of the parties, error may be assigned.

Outside of the regular routine of courts, there is a Court of Accounts, considered as the next in rank to the Court of Cassation, whose jurisdiction is confined to the consideration of all cases touching the public exchequer. The court consists of a Chief President, three Vice-Presidents, and eighteen Masters of Accounts, who form the sections or chambers. There are also eighty-four referendary counsellors, who examine the accounts of the public collectors, and report thereon, twenty auditors, a procureur general, and a registrar. The machinery is very complete, and the method of public accounts now in use in France is considered the most perfect in Europe.

There is also a so-called High Court of Justice, established under the provisions of the Imperial Constitution of 1852, for the cognizance, without appeal, of crimes and conspiracies against the Emperor, the Imperial family, and the security of the State. This court need only be mentioned without being further noticed.

A striking distinction between the English and French judicial systems, is in the number of the judges under each, and the salaries of the judges. The whole corps of English judges, excluding justices of the peace, commissioners in bankruptcy, and police magistrates, consists of only about twenty-four persons, with salaries varying from sixty thousand to twenty thousand dollars, besides perquisites which often exist, and the right of appointment to office, almost always exercised upon the principle that "charity begins at home." In France there are three hundred and sixty-three arrondissements, with a tribunal of First Instance in each, composed of from three to

eight members according to population, say about eighteen hundred judges, with a salary, on an average, of only about four hundred dollars a year. There are twenty-seven departments, each with an Imperial Court of from twenty to forty or more judges, in all about nine hundred, with salaries ranging from five hundred to fifteen hundred dollars. The Court of Cassation is composed of forty-nine judges, with different salaries, in no case exceeding four thousand dollars. There are, therefore, about twenty-seven hundred judges for the same kind of legal business, which in England is dispatched by about twenty-five judges. And yet, notwithstanding this startling disproportion between the number of judicial functionaries, the aggregate of the salaries of the English judges exceeds those of the French by fully half a million of dollars. Lord Brougham, in his Treatise on the English Constitution, from which I have drawn some of the foregoing facts, estimates the salaries of the French judges at £750,000, the English at £850,000 and for all the British Isles at £1,325,000. This work was published some years ago, but the proportions are still probably about the same. It is obvious that the French, like our American judges, are badly paid, while, on the other hand, the English judges are, perhaps, overpaid. It is true that the salary ought to be proportioned to the profits of professional labor, so as to command for the Bench the best talent of the Bar. And we know that the income of some few of the first-class counsel in England in full practice, is very large. But such cases are exceptional, and the average of legal incomes among the superior lawyers of the Bar, may be put at a much more moderate figure. It is said that the fee of Sir Thomas Wilde, afterwards Lord Chancellor Truro, in the case of *Atwood vs. Small*, 6 Cl. & F., 232, was £8,000. The fee of Cicero, or the gratuity given him by his client for defending Publius Sylla, was about the same, being a million sesterces. Such windfalls happen only once in a lifetime, and with some centuries between the lives.

In both England and France the judges and lawyers wear gowns in court, and while in the discharge of their functions. The French judges and lawyers, in addition, wear a high-crowned rimless hat or cap, and the English judges and lawyers a peculiar wig. The cap was, no doubt, at one time, common to both nations, being still put on by the judge in England when he passes sentence of death upon a criminal. And Lord Campbell says in his *Lives of the Chief Justices*, that until the middle of the last century the Chancellor is always represented with his hat on. In early times this hat was round and

conical, and such was Lord Keeper Williams', although he was a Bishop. In the reign of Queen Anne three-cornered caps came to be used, and the habit of wearing hats or caps on the Bench prevailed down to the beginning of the present century. "It was observed," continues Lord Campbell, "for a number of years before Lord Kenyon died, that he had two hats and two wigs, one of each dreadfully old and shabby, the other comparatively spruce. He always carried into court with him the very old hat and the comparatively spruce wig, or the very old wig and the comparatively spruce hat. In the former case he shoved his hat under the bench, and displayed his wig. In the latter he always continued covered. I have a very lively recollection of having often seen him sitting with his hat over his wig." *Lives of the Chief Justices*, ch. xlv. This custom of wearing the hat has entirely ceased in England, but continues in France in the rimless cap already mentioned. The Judges wear this cap nearly all the time while in the discharge of their functions, and the lawyers often keep it on when addressing the court. The old Judge in Racine's only comedy, *Les Plaideurs*, insists upon the youth, who assumes for the nonce the duties of an advocate, putting on his cap before he begins to argue his client's cause. From which it would seem that the cap was, in those days, as much a necessary part of the lawyer's costume as the wig is now esteemed to be in England. The wig was, at first, only the fashionable article of dress of the period of Charles II, and Louis XIV. It is no longer now, as it appears in the engravings of Lord Mansfield and Lord Camden, and as it may be yet seen on the stage in the scenes of Moliere's charming comedies, with full bottom and long curls reaching to the shoulders. Then it certainly contributed a positive element to the general expression, acting as a foil to the ugliness of Charles II, and giving some dignity to the otherwise common place lineaments of a Pepys. It is now a close-cut toupee, flat on the crown, and carefully curled into three rows of curls encircling the head, with a small pig tail queue at the back. No costume could well have been devised better adapted to destroy individuality of expression, and to reduce all persons to a common level of looks. The play of feature, so essential to the success of the orator, is greatly interfered with.

About the middle of the first quarter of the last century, Louis Holberg, a distinguished Danish author, visited Paris, and gives us, in his autobiography, the impressions made upon him by the French lawyers and judges: "I used frequently," he says, "to attend the

Palace of Justice, to observe the manner in which the French civil law was administered. I admired the eloquence of the advocates; their enunciation was noble, the arrangement of their discourses apt, their figures diversified; and such was their power in moving the passions of their hearers, that you might have fancied Cicero or Demosthenes to be addressing an audience in the French language. Nothing, however, could be more slovenly and indecorous than the manner in which the Judges gave their suffrages in the cases before them. They would rise suddenly from their seats before the pleadings were concluded, and, forming a circle in the middle of the court room, whisper something in the ear of the President, who proceeded to deliver his judgment. While the Judges were in the act of deliberating, the disputes of the advocates continued without intermission, and the utmost confusion and disorder raged on all sides. Even while the advocates were pleading, the noise made by the auditors, if auditors they could be called, was so great that it seemed to be rather a market place than a court of justice; and though the officers of the court were perpetually enjoining silence, their authority contributed but little towards the restoration of that decency and order which should regulate judicial proceedings."

To the general truthfulness of this picture, I can myself bear witness, although the prevailing disorder is somewhat exaggerated, and should, moreover, be confined to the Courts of First Instance and the Courts of Assize. The Judges listened to the advocates more patiently than in England. But the mode of agreeing upon their judgment by the coming together of the Judges in the center of the large open space between the semi-circular rostrum of the Judges and the corresponding half-circle of the bar, and whispering together, seemed to be a very crude and archaic mode of consultation. Doubtless, the publicity and promptness meets a peculiarity of French nature; and the judgment thus formed, and delivered at once, is more satisfactory to the suitors and their advocates than if formed in secret session, with more deliberation. If it were not so, the practice would long since have been changed.

The English judges and lawyers enter with lively zest into the business before them. The lawyer goes straight to the point of his case, and the judge shows his attention not only by his attitude and manner, but by his incessant supervision of everything going on, and by his frequent interruptions. At *nisi prius* they take full notes of the testimony, and of all the points made. Besides the desire of worthily discharging the functions of their office, most of them take

a positive pleasure in the routine of business. "When M. Cottu, the French advocate," says Lord Campbell, "went the Northern Circuit, and witnessed the ease and delight with which Mr. Justice Bayley got through his work, he exclaimed '*Il s'amuse à juger!*' and Judge Buller used to say, somewhat irreverently, that his idea of heaven was to sit at *nisi prius* all day, and play at whist all night." This is somewhat different from Gray's idea of Paradise, which was to lie on a sofa and read such novels as *Gil Blas*. It is certain that the impression made upon me by the English judges, was that they felt a positive pleasure in the performance of their duties. The labor itself did not seem at all irksome, and they relished it as Englishmen seem to relish exertion, either physical or mental. The French, on the contrary, as a general rule, have the appearance of being engaged in rather a disagreeable business, to be gotten over as soon and with as little trouble as possible. They seem often to be thinking of anything rather than the case before them, and still oftener continue, all the time an advocate is speaking, deliberately engaged in the act of writing. They rarely, however, interrupt counsel while speaking, whereas the English judge takes a particular pleasure in this pastime for them, but death to the lawyer, oftentimes for nothing better than a play upon words, or a passing witticism.

The bench and bar both of England and France, without being remarkable for a very high order of talent, are, as a body, noted for integrity and professional ability. There is no towering genius like Mansfield or D'Agnesseau, but the average of judicial ability is good. There is no Erskine, nor even a Brougham among the existing advocates, but the cause of this dearth is owing, perhaps, more to the absence of great causes which move a whole people and stir up the slumbering spirit of eloquence, than to the want of the proper material. Berryer, the great advocate, still survives in France (when these notes were written), the shadow of his former self, and his services are called into requisition in all cases wherein politics can be brought to play a part. The long quiescence of parties both in England and France, and the want of motive of complaint against the tyranny of government, are wonderful drawbacks on high forensic display. Both nations are rich and prosperous, and desire to keep on good terms with their own people, and the rest of the world. How long this may continue no one can foresee, and the general feeling, especially on the continent among the settled classes, is of doubt in the future, but for the present all is peace and quiet. Great orators may be dispensed with for the blessings which both people now enjoy.

One marked distinction of the administration of justice in France from that of England, is the absence of jury trial except in criminal cases of a high grade. In these cases, the formation and mode of action of the jury are peculiar. An annual list of jurymen for the assize chamber of each Imperial court is made out by a double selection. In the first place, a commission in each canton, composed of the Justices of the Peace, the Mayors of the towns, and the President of the Canton, makes out the lists preliminary to the annual list. These preparatory lists consist of thrice the number of names forming the jury contingent of the Canton. From these lists, another commission, composed of the Prefect, President, and Justices of the Peace of the Arrondissement, select the number of jurymen required. A supplementary list is also made out to supply vacancies which may occur in the regular pannel. These revised lists, formally authenticated by the Prefect, are sent to the clerk of the court charged with the duty of holding the assizes. A jurymen must be at least thirty years of age, and in the enjoyment of all his political, civil, and family rights. Those who can neither read nor write, and domestic servants, can not act as jurymen; and those who depend for support on their daily manual labor, are excused from service. To these exceptions are also to be added certain officials and persons engaged in particular avocations, who are exempted by special law. By the original law establishing the jury in criminal cases, the verdict of the jury was by a majority. If equally divided, the verdict was held to be in favor of the accused. In 1832, the law was changed so as to require a majority of seven to convict, and in 1848 the necessary majority was raised to nine. But by the Act of 1853, the original law was restored, and now the decision of the jury, either as to the guilt or innocence of the prisoner, or as to the existence of extenuating circumstances, is by a simple majority. The verdict is rendered by a declaration of the result without disclosing the number voting the one way or the other, such disclosures being expressly prohibited. The jury are permitted to discuss among themselves the questions submitted to them, but the verdict is ascertained by a secret ballot, the votes being destroyed as soon as the result is ascertained. In case the accused is found guilty, the court, if satisfied that the jury—while observing all the forms required—have erred in their conclusions, may set aside the verdict and order a new trial by another jury at a subsequent session of the assize. But this must be done by the court upon its own motion, immediately after the rendition of the verdict, and can not be demanded by the defendant as of

right. After the verdict of a second jury to the same effect, the court can not grant another trial. This limitation, however, only applies to the question of fact found by the jury. Errors of law, or other grounds of nullity of the proceedings, stand upon a different footing, and may be insisted upon by the defendant as matter of right.

In practice the verdicts of juries are favorable to the accused except in very clear cases, and, even then, the sympathies of the jurors often lead them to find extenuating circumstances, which mitigate the punishment from death to imprisonment for life. A general feeling which pervades all classes of French society against the infliction of the punishment of death, tends largely to bring about this state of affairs. Nearly every journal in Paris has been advocating recently the abolishment of capital punishment, on the heels of two of the most atrocious cases of crime which even the annals of France can produce. One of these cases was the murder of a mother by her son in broad-day-light, by deliberately thrusting her head into a cess-pool and holding it there until she was suffocated, the sole motive being the wish to obtain the sum of a thousand or two francs of which she was possessed. Even in this shocking case the jury found mitigating circumstances, and the prisoner was condemned to hard labor for life instead of the guillotine. The other case was a real "*cause celebre*." A physician of good family and good standing, who was known as the Count de la Pommerais, procured insurances on the life of his mistress, a widow in indigent circumstances, with two or three children, in different insurance companies, to the amount of five hundred and fifty thousand francs (over one hundred thousand dollars), induced her to assign the policies to him and to make a will in his favor, and then deliberately brought about her death by administering, for a slight ailment, digitalis, an active poison, which, the medical witnesses testified, leaves no trace in the system. The defendant was also indicted for having previously murdered his wife's mother in the same way, to get control of her property. The jury acquitted him of the latter charge, rather from a deficiency of evidence than because satisfied of his innocence, but found him guilty of the murder of his mistress, and without extenuating circumstances. The jury were, however, afterwards induced to sign a petition to the Emperor to remit the capital punishment, and this application was seconded by the press of Paris without exception so far as I could see. The Emperor did not yield to the solicitations, and the murderer was guillotined on the morning of the 10th of June, 1864.

The objection to capital punishment seems to be one of sentiment rather than reason, and has been best met by Alphonse Karr in one of those papers, under the title of "The Wasps," with which he used to sting his contemporaries, and made himself at one time famous. "*Ma foi*," he said, "I am very willing to see the taking of life put an end to, if only Messieurs, the assassins, will begin first!"

W. F. COOPER.

*Notice of Dishonor of Negotiable Instruments--When Notice
Necessary, and How Framed.*

§ 1. When a negotiable bill or note is dishonored by non-acceptance on presentment for acceptance, or by non-payment at its maturity, it is the duty of the holder to give immediate notice of such dishonor to the drawer, if it be a bill, and to the indorser whether it be a bill or note. The party primarily liable is not entitled to notice, for it was his duty to have provided for payment of the paper; and the fact that he is maker or drawer for accommodation does not change the rule.¹

Notice is not due to any party to a bill or note not negotiable; the rules of the law merchant concerning notice and protest applying to none but strictly commercial instruments.²

It is regarded as entering as a condition in the contract of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that acceptance or payment is only demanded; and he notified if it is not made. And in default of notice of non-acceptance or non-payment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.

This, then, is one of the most important branches of the law of negotiable paper.

§ 2. As to the form of the notice, no particular phrase or form is necessary. The object of it is to inform the party to whom it is sent: 1. That the bill or note has been presented. 2. That it has been dishonored by non-acceptance, or non-payment, and; 3. That the holder considers him liable, and looks to him for payment.³ And in framing the notice all that is necessary to apprise the party of the

¹Hays vs. N. W. Bank, 9 Grat. 127.

²Pitman vs. Breckenridge, 3 Grat., 129.

³In *Early vs. Preston*, 2 Pat. & Heath, 229, the following notice was accepted as good in form, and seems in every respect unobjectionable:

RICHMOND, August 20, 1842.

SIR: Please take notice that a draft drawn by S. H. Davis on Samuel S. Saunders, dated Lynchburg the 18th of February, 1842, for two thousand dollars, at six months' date, and indorsed by Joel Early, and Pleasant Preston, and A. Tompkins, Cashier, has been protested for non-payment by the President and Directors of the Farmers' Bank of Virginia, payment having been refused at the counting room of

dishonor of the instrument, is to intimate that he is expected to pay it.¹

When a protest is necessary in order to charge the drawer or indorser, the notice should state that the bill was *protested*, in order to show that his liability was fixed; but if, in point of fact, the bill was *noted for protest*, no statement as to protest in the notice is necessary. And in one case it has, indeed, where the notice stated expressly that the bill *had not been protested*, been held by the Court that it might mean no more than that the protest had not been extended, and it might still be understood that it had been noted.² Where the party receiving notice is abroad, it has been said that the notice should mention the protest, since he could not readily ascertain as to the fact by inquiry;³ but this doctrine does not seem to have become ingrafted into the principles of the law merchant.

It is now settled—though the contrary at one time was maintained—that it is not necessary that a copy of the protest of a foreign bill should accompany notice of its dishonor.⁴ But information of the notice should be sent⁵ if the party to whom notice is transmitted resides abroad.⁶

NOTICE MAY BE VERBAL OR WRITTEN.

§ 3. The notice need not be in writing—it is sufficient if it be given verbally,⁷ but for precision and safety written notice is preferable. Verbal notice must be necessarily confined to those cases in which notice is directly given to the party in person, or is sent by a messenger to his place of business or residence. It seems that a verbal notice is less strictly construed than a written one, especially when its sufficiency is impliedly admitted by the party's response.⁸ Thus,

S. S. Saunders on the 20th instant, and you are held liable as indorser for all loss, damages, principal, interest, cost and charges sustained or to be sustained by reason of the non-payment aforesaid. Yours, ARCHIBALD BLAIR, Notary Public.

To PLEASANT PRESTON.

¹Byles on Bills, (Sharswood's ed.,) 411, 412, 413.

²Brown vs. Dunbar, Thomson on Bills, 332.

³Lord Ellenborough in Rolins vs. Gilson, 3 Camp., 334, 1 M. & S., 288; Thomson on Bills, 334.

⁴Goodman vs. Harvey, 4 Ad. & El., 870, (31 E. C. L. R.); Wallace vs. Agry, 4 Mason 336; Story on Bills, § 302.

⁵Rogers vs. Stephens, 2 T. R., 713; Byles on Bills, (Sharswood's ed.,) 418. ⁶*Id.*

⁷Glasgow vs. Pratte, 8 Misso., 336; First National Bank vs. Ryerson, 23 Iowa, 508; Cuyler vs. Stevens, 4 Wend., 506; Thompson vs. Williams, 14 California, 160; Gilbert vs. Dennis, 3 Met., 495; Byles on Bills, (Sharswood's ed.,) 411; Story on Notes, § 341; 1 Parsons' N. & B., 477; Thomson on Bills, 336; Tindal vs. Brown, 1 T. R., 167.

⁸Byles on Bills, 412; Phillips vs. Gould, 8 C. & P., 353, (34 E. C. L. R.)

where the holder's clerk told the drawer that the bill had been duly presented, and that the acceptor could not pay it, and the drawer replied that he would see the holder about it, this was held to be sufficient evidence to warrant the jury in finding that the fact of the dishonor of the note was sufficiently communicated to the drawer.¹

Mere knowledge of dishonor does not constitute notice.² Notice signifies more; but when the fact of dishonor is communicated by one entitled to call for payment, it becomes notice, as it is then to be inferred that the intention is to hold him responsible.³

DESCRIPTION OF THE BILL OR NOTE DISHONORED.

§ 4. The notice should describe the bill or note in unmistakable terms; should state where the note is that the party notified may find it; should state who the holder is, and who gives the notice, or at whose request it is given. Such, at least in theory, are the requisites of a proper notice; and a good business man should never neglect to comply with them. But the courts are not strict in requiring this thorough description of the dishonored instrument; and the requirements of the law are considered as satisfied by any description which, under all the circumstances of the case, so designates the bill or note as to leave no doubt in the mind of the party, as a reasonable man, what bill or note was intended.⁴

§ 5. The entire omission of the maker's name in the notice of dishonor of a note would be fatal;⁵ but notice to the acceptor describing the bill as "drawn by you," though not naming the drawer, has been held sufficient, there being no proof that he had drawn or indorsed any other paper with which it could be confounded, and it being otherwise correctly described.⁶ And likewise, notices describing a note as a bill,⁷ a bill as a note,⁸ or the drawer as acceptor,⁹ have been held not vitiated thereby.¹⁰

¹*Metcalfe vs. Richardson*, 11 C. B., 1011, (73 E. C. L. R.)

²*Juniata Bank vs. Hale*

³*Caunt vs. Thompson*, 7 Com. B., 400; *Miers vs. Brown*, 11 M. & W., 372; *Tindal vs. Brown*, 1 T. R., 167.

⁴*Gilbert vs. Dennis*, 3 Met., 495; *Shelton vs. Braithwaite*, 7 M. & W., 436; 1 *Parsons N. & B.*, 472, 474.

⁵*Home Insurance Company vs. Green*, 5 Smith, (19 N. Y.), 518. See, also, *Stockman vs. Parr*, 11 Mees & W., 809, S. C.; 1 Car. & K., 41.

⁶*Gill vs. Palmer*, 29 Conn., 34.

⁷*Messenger vs. Southey*, 1 Man. & G., 76, (39 E. C. L. R.)

⁸*Sockman vs. Par*, 11 M. & W., 809.

⁹*Mellersh vs. Rippen*, 7 Exch., 578.

¹⁰*Overruling in effect Beauchamp vs. Cash*, 1 Dow. & R., 3.

The notice need not state who is the holder of the bill or note;¹ nor at whose request it is given;² nor where the demand was made;³ nor at what hour it was presented;⁴ nor where it is lying, nor on whose behalf payment is demanded;⁵ nor that the party presenting had the paper with him at the time;⁶ nor at what time it fell due;⁷ nor the absence of the maker when it was presented.⁸

But it should be signed, or indicate from whom it proceeds—otherwise it will be insufficient.⁹ It is not necessary that the party should know the fact of dishonor if the notice unequivocally states it.¹⁰

The decisions in the United States go to the extent of holding that a notice to the indorser of a note, simply stating the name of the maker, the amount, and the fact that it was indorsed by the party to whom notice was sent, is sufficient.¹¹ But if there are any circumstances which caused this meagre description to mislead the party receiving the notice—as for instance, if he were the indorser of two or more notes to which the terms of the notice might equally apply, then the notice might be void for uncertainty of description.¹²

A notice without date, stating that the instrument had been “this day presented for payment,” would be defective in not fixing the date

¹Mills *vs.* Bank United States, 11 Wheat., 431; Bradley *vs.* Davis, 26 Maine, 45.

²Shed *vs.* Brett, 1 Pick., 401.

³Mills *vs.* Bank United States, 11 Wheat., 431. In this case the Supreme Court said: “The last objection to the notice is, that it does not state that payment was demanded at the Bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is a matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, practice is not to state in the notice the mode or place of demand, *but the mere, naked fact of non-payment.*”

⁴Fleming *vs.* Fulton, 6 How., (Misso.,) 473.

⁵Woodshop *vs.* Lawes, 2 M. & W., 109; Harrison *vs.* Ruscoe, 15 M. & W., 231.

⁶Mainer *vs.* Spurlock, 9 Rob., La., 161.

⁷Denegre *vs.* Hiriart, 6 La., An., 100.

⁸Sanger *vs.* Stimpson, 8 Mass., 260.

⁹Klockenbaum *vs.* Pierson, 16 California, 375; Walker *vs.* State Bank, 8 Misso., 704.

¹⁰Jennings *vs.* Roberts, 4 E. B., 615, (82 E. C. L. R.)

¹¹Housatonic Bank *vs.* Ladin, 5 Cush., 546; Youngs *vs.* Lee, 18 Barbour, 187; Beals *vs.* Peck, 12 Barb., 245.

¹²1 Parsons N. & B., 473; Story on Bills, § 301; Cook *vs.* Litchfield, 5 Seld., 279; Cayuga Bank *vs.* Warden, 1 Comstock, 415.

of dishonor;¹ but no misdescription of the date of the instrument will vitiate the instrument, unless it misleads.² Nor will such a misdescription of the amount;³ nor of the names of the parties;⁴ nor of the time it fell due.⁵

¹Wynn vs. Alden, Denio., 163; but this is doubted; 1 Parsons N. & B., 474.

²Mills vs. Bank United States, 11 Wheat., 431. In the case cited, the note of Wood & Ebert, for \$3,600, was dated "20th July, 1819," and was payable "sixty days after date, at the office of discount and deposit of the Bank of the United States, at Chillicothe," and the notice was as follows:

"CHILICOTHE, 22d September, 1819.

SIR: You will hereby take notice that a note, drawn by Wood & Ebert, dated 20th day of September, 1819, for \$3,600, payable to you or order in sixty days at the office of discount and deposit of the Bank of the United States at Chillicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you.

Yours, respectfully,

LEVI BELT, Mayor of Chillicothe.

"PETER MILLS, Esq."

The notice was sustained, the Court saying that the error of substituting September for July was apparent on the face of the notice, and immaterial, as the mistake could not mislead. Dennistonn vs. Stewart, 17 Howard, 606; Tobey vs. Lennig, 14 Penn., State, 483; Kilgore vs. Buckley, 14 Conn., 362; Ross vs. Planters' Bank, 5 Humph., 335; Cayuga County Bank vs. Warden, 1 Comstock, 413; Byles on Bills, (Sharswood's ed.), 417.

³Bank of Alexandria vs. Swann, 9 Peters, 33. In which case the Court said: "The misdescription complained of in this case, is in the amount of the note. The note is for \$1,400, and the notice describes it as for the sum of \$1,457. In all other respects the description is correct; and in the margin of the note is set down in figures 1,457; and the question is, whether this was such a variance or misdescription as might reasonably mislead the indorser as to the note, for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the 5th of February, 1828, (the date of a note for which the one now in question was a renewal,) down to the day of the trial of this cause, there was no other note of the said Humphrey Peake indorsed by the defendant, discounted by the Bank, or placed in the Bank for collection, or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note." Bank of Rochester vs. Gould, 9 Wend., 279; Reedy vs. Seixas, 2 Johns. Cas., 337; Rowan vs. Odenheimer, 5 Smedes & M., 44; Snow vs. Perkins, 2 Mich., 238.

In Cayuga County Bank vs. Warden, 1 Comstock, 413, 2 Selden, 19, the note was for \$600, and the notice to the indorsers described it as for \$300. It being the *only* note of the maker, Warden, indorsed by the defendants, and "\$600" being indorsed on the margin of the notice, it was held sufficient. Jewett, Ch. J.: "Who can doubt but that this notice conveyed to the minds of the defendants the information that this identical note had been dishonored, although it misdescribed the note as it respects the sum for which it was made in the body of it."

⁴Dennistonn vs. Stewart, 17 Howard, 606; Carter vs. Bradley, 19 Maine, 62; Smith vs. Whiting, 12 Mass., 6.

⁵Smith vs. Whiting, 12 Mass., 6.

§ 6. As to the statement of dishonor, it was held at one time that the presentment and dishonor of the bill or note, must appear on the face of the notice "in express terms or by necessary implication;"¹ but the later and better ruling is that it is sufficient if this appear by "reasonable intendment."² The mere statement that the bill or note is unpaid, is not sufficient to intimate by "reasonable intendment" that the bill or note has been dishonored, for the holder may not have used due diligence in presenting it; and, therefore, something more must appear.³ But it may be when the paper is payable at a Bank.⁴ Nor will it be sufficient to say simply that payment was demanded unless it appear also that it was presented.⁵ But the direct statement that the instrument has been "dishonored," is sufficient, that word including the presentment and demand which were necessary;⁶ and there are other words which, coupled with the statement of non-payment, indicate sufficiently a dishonor. Thus: "Your bill is unpaid, *noting* 5s;"⁷ or, "is this day returned with charges."⁸ The expression, "returned unpaid," was held insufficient to indicate dishonor at one time;⁹ but subsequently, the opposite view prevailed.¹⁰

¹*Solarte vs. Palmer*, 7 Bing., 530, (20 E. C. L. R.); 5 *Moo. & P.*, 475; 1 *Crump. & J.*, 417; 1 *Tyrw.*, 371; *Boneton vs. Welsh*, 3 Bing., N. C., 688; *Byles on Bills*, (Sharwood's ed.,) 413.

²*Hedger vs. Stevenson*, 2 M. & W., 799; *Lewis vs. Gompertz*, 6 M. & W., 402; *Byles on Bills*, (Sharwood's ed.,) 413, n. 9, and 416.

³*Phillips vs. Gould*, 8 C. & P., 355, (34 E. C. L. R.); *Strange vs. Price*, 10 Ad. & El., 125, (37 E. C. L. R.); *Furze vs. Sharwood*, 2 Q. B., 338, (42 E. C. L. R.); *Messenger vs. Southey*, 1 Man. & G., 76, (39 E. C. L. R.); *Boneton vs. Welsh*, 3 Bing., N. C.; 688; (32 E. C. L. R.); *Hartley vs. Case*, 4 Barn. & O., 339; *Gilbert vs. Dennis*, 3 Met., 495; *Townsend vs. Lorain Bank*, 2 Ohio State, 355; *Armstrong vs. Thruston*, 11 Md., 148; *Graham vs. Sangston*, 1 Md., 60; *Arnold vs. Kinloch*, 50 Barb., 44; *Ething vs. Schuylkill Bank*, 2 Barr, 356; *Sinclair vs. Lynch*, 1 Spears, 244; *Clark vs. Eldridge*, 13 Met., 96; *Pinkham vs. Macy*, 9 Id., 174; *Lockwood vs. Crawford*, 18 Conn., 361. In *Mills vs. Bank United States*, 11 Wheat., 431; cited in a previous note, it is said *obiter* by the Supreme Court that "the mere, naked fact of non-pay-

⁴See previous note.

⁵*Mussen vs. Lake*, 4 Howard, 262.

⁶*Stocken vs. Collin*, 9 C. P., 653, (38 E. C. L. R.); 7 M. & W., 515, S. C.; *Woodthorpe vs. Lawes*, 2 M. & W., 109; *Shelton vs. Braithwaite*, 7 M. & W., 436; *Edmunds vs. Cates*, 2 Jurist, 183; *Lewis vs. Gompertz*, 6 M. & W., 400; *King vs. Bickley*, 2 Q. B., 419; *Rowland vs. Springett*, 14 M. & W., 7, (E. C. L. R.); *Smith vs. Boneton*, 1 Hurl. & W., 3.

⁷*Armstrong vs. Christiani*, 5 C. B., 687, (57 E. C. L. R.); *Hedger vs. Stevenson*, 2 M. & W., 719; 5 Dowl., 771.

⁸*Grugeon vs. Smith*, 6 Ad. & El., 499, (33 E. C. L. R.); 2 Nev. & P., 303; *Everard vs. Watson*, 1 Ellis & B., 801.

⁹*Boneton vs. Welsh*, 3 Bing., N. C., 688.

¹⁰*Robson vs. Curlewis*, Car. & M., 378; S. C., 2 Q. B., 421.

And likewise "protested" in the case of promissory notes and inland bills,¹ as well as of foreign bills.²

§ 7. There is conflict of authority on the question whether or not the indorser is discharged by a misstatement in the notice of the time of presentment or protest, when in fact there had been no irregularity. Some cases hold that, if he were not misled, the notice is valid;³ but others decide it to be invalid, it, in fact, communicates to the party that he is discharged in stating presentment or protest at an improper time.⁴

Where there was a misstatement in the notice of the party on whose behalf it was given, it was held that the notice was not thereby wholly avoided; but the party giving it was placed in the same situation as to the party to whom it was given, as if the representation had been true. And, therefore, that defendant would be entitled to

ment is sufficient." This dictum is explained in *Gilbert vs. Dennis*, 3 Metcalf, 495, is reconcilable with the text, and we concur fully in what is said by Shaw, C. J., in the latter case. Says he, speaking of the case of *Mills vs. Bank United States*: "In the case, then before the Court, the notice contained a full and precise statement of the presentment, demand and non-payment by the maker. The objection with which the Court were dealing was, that the notice did not specify the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of non-payment. Applied to the facts of that case it may be construed to mean non-payment after due presentment. So when the learned Judge speaks of the practice of commercial cities, he speaks of notice of the mere naked non-payment, in contradistinction to stating in the notice, the mode and place of demand. That such is the meaning, may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies non-payment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of non-payment is notice of dishonor; as where the note is in terms, or by usage or special agreement, payable at a Bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored."

¹*Para. N. & B.*, 471; *Mills vs. Bank United States*, 11 Wheat., 431; *Bank of Alexandria vs. Swann*, 9 Pet., 33; *Brewster vs. Arnold*, 1 Wisc., 264; *Kilgore vs. Buckley*, 14 Conn., 362; *Smith vs. Little*, 10 N. H., 526; *Howe vs. Bradley*, 19 Maine, 31; *Cook vs. Litchfield*, 5 Sandf., 330; 5 Seld., 279; *Youngs vs. Lee*, 2 Kernan, 551; *Housatonic Bank vs. Lafin*, 5 Cush., 546; *Beals vs. Peck*, 12 Barb., 445; *Denegre vs. Hiriart*, 6 La., Ann., 100; *Burgess vs. Vreeland*, 4 N. J., 71; *Contra. Platt vs. Drake*, 1 Doug., Mich., 296.

²*Crawford vs. Branch Bank*, 7 Ala., 205; *Spies vs. Newberry*, 2 Doug., (Mich.), 495.

³*Ontario Bank vs. Petrie*, 3 Wend., 456; *Crocker vs. Getchell*, 23 Maine, 392; *Byles on Bills*, Sharswood's ed., 417; note 1.

⁴*Routh vs. Robertson*, 11 Smedes & M., 362; *Etting vs. Schuylkill Bank*, 2 Penn. State, 355; *Ransom vs. Mock*, 2 Hill, 587; *Townsend vs. Lorain Bank*, 2 Ohio State, 345; 1 *Parsons' N. & B.*, 476.

every defense against the plaintiff that he would have had if the notice had been given by the party named.¹

§ 8. As to the statement that the holder looks to the party to whom notice is sent for payment, the express statement in the notice to this effect was, as it might seem, formerly held necessary;² but the prevailing rule at the present time is, that the mere fact of giving notice to the party implies that he is looked to for payment.³

WHO MAY GIVE NOTICE OF DISHONOR

§ 9. The notice of dishonor should emanate from the holder of the instrument at the time of its dishonor and should be communicated to all the parties whom he means to hold liable for its payment. But it is not absolutely necessary that it should come from him, for the holder is entitled to the benefit of notice given in due time by any party to the instrument who would be liable to him if he, the holder, had himself given him notice of dishonor.⁴ Thus if the holder duly notifies the sixth indorser, and he the fifth, and he the fourth, and so on to the first, the latter will be liable to all the parties.⁵ The liabil-

¹Harrison *vs.* Ruscoe, 15 M. & W., 231.

²Tindal *vs.* Brown, 1 T. R., 169; Solarte *vs.* Palmer, 7 Bing., 530, (20 E. C. L. R.)

³In Bank United States *vs.* Carneal, 2 Peters, 543, the United States Supreme Court said: "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice." Bank of Cape Fear *vs.* Seawell, 2 Hawks., 560; Warren *vs.* Gilman, 5 Shep., 360; Shrieve *vs.* Duckham, 1 Litt., 194; Cowles *vs.* Harts, 3 Conn., 517; Townsend *vs.* Lorain Bank, 2 Ohio State, 345; Burgess *vs.* Vreeland, 4 N. J., 71; Barstow *vs.* Hiriart, 6 La., Ann., 98; Story on Promissory Notes, § 353; Furze *vs.* Sharwood, 2 Q. B., 388, (42 E. C. L. R.); Chard *vs.* Fox, 14 Q. B., 200, (68 E. C. L. R.); Metcalf *vs.* Richardson, 20 Eng., L. & Eq., 301; Miers *vs.* Brown, 11 Mees. & W., 372; Caunt *vs.* Thompson, 7 C. B., 400, (62 E. C. L. R.); King *vs.* Buckley, 2 Q. B., 419, (42 E. C. L. R.); Thompson on Bills.

⁴Champman *vs.* Keene, 3 Ad. & El., 193; 4 Nev. & M., 607; Lysaght *vs.* Bryant, 9 C. B., 46; S. C., 2 Carr. & K., 1016; Jameson *vs.* Swinton, 2 Camp., 373; Wilson *vs.* Swabey, 1 Stark., 34; Stafford *vs.* Yates, 18 Johns., 327; Bachellor *vs.* Prest, 12 Pick., 406; Stanton *vs.* Blossom, 14 Mass., 116; Bank U. S. *vs.* Goddard, 5 Mason, 366; Triplett *vs.* Hunt, 3 Dana, 126; Renshaw *vs.* Triplett, 23 Misso., 213; Whitman *vs.* Farmers' Bank, 8 Porter, (Ala.), 258; Wilson *vs.* Mitchell, 4 Howard, (Miss.), 272; Marr *vs.* Johnson, 9 Yerger, 1; Abat *vs.* Rien, 9 Mart., La., 465; Story on Prom. Notes, § 301; Story on Bills, § 304; 1 Parsons, N. B., 503-4; Tindal *vs.* Bronn, 1 T. R., 167, and *E-xparte* Barclay, 7 Vesey, 597, are overruled.

⁵Hilton *vs.* Shepherd, 6 East, 14.

ity of the party must be fixed before he is himself competent to give notice, and that it may enure to the holder's benefit.¹

§ 10. It is certain that notice from a mere stranger is insufficient;² and it is equally well established that a party to the bill, who has been discharged by laches, and who could not in any event sue, can not give notice for his own or another's benefit, he being then a mere stranger to the paper.³ A creditor holding the paper as collateral security,⁴ or a Bank or other agent for collection,⁵ is a holder for the purposes of notice; and so also, is he who accepts or pays *supra protest*.⁶

The broad doctrine is laid down by some of the authorities that any party to the instrument may give notice;⁷ but as we have already seen this rule is certainly not without exception, for if the party be discharged he can no longer interfere with the rights of others. And the proper limitation to the rule seems to be that he must be a party whose liability is fixed, and who on the paper being returned to him when he pays it, will be entitled to reimbursement from some prior party.⁸

§ 11. It was held in some early cases that the acceptor of a bill who refuses to pay might give notice;⁹ but the text-writers explain that they must have been cases in which the holder constituted the

¹Lysaght vs. Bryant, 9 C. B., 46; Harrison vs. Ruscoe, 15 M. & W., 231; Thompson on Bills, 357, (Wilson's ed., 1865); Bayley on Bills, 254.

²Stanton vs. Blossom, 14 Mass., 116; Chanoine vs. Fowler, 3 Wend., 173; Juniata Bank vs. Hale, 16 Sergt. & R., 157; Brailsford vs. Williams, 15 Md., 150; Stewart vs. Kennett, 2 Camp., 177; Byles on Bills, (Sharswood's ed.,) 430.

³Harrison vs. Ruscoe, 15 L. J., Exch. 110, 15 M. & W., 231. Turner vs. Leech, 4 B. & Ald., 451; Rowe vs. Tipper, 13 C. B., 249.

⁴Peacock vs. Pursell, 14 C. B., (N. S.,) 728, (108 E. C. L. R.)

⁵Butler vs. Duval, 4 Yerger, 265.

⁶Konig vs. Bayard, 1 Peters, 262; Martin vs. Ingersoll, 8 Pick., 1.

⁷See 1 Parsons, N. & B., 503; Wilson vs. Swabey, 1 Stark., 34; In Chitty on Bills, c. 10 p., 524, 527, it is said: "It suffices if it be given after the bill was dishonored, by any person, who is a party to the bill, or who would on the same being returned to him, and after paying it, be entitled to require reimbursement." And Story on Bills, § 304, adopts the principle in almost the identical language of Chitty. But the substitution of "and" for the disjunctive "or" would seem to be the correct statement of the law on the question—that the notice should come from one "who is a party to the bill or note, and who would on the same being returned to him, and after paying it be entitled to require reimbursement." The authorities cited in the next note are to this effect.

⁸In Bayley on Bills, it is said (p. 254, 256): "The notice must come from the holder or from some party entitled to call for payment or reimbursement." See also, Chanoine vs. Fowler, 3 Wend., 173.

⁹Shaw vs. Craft, Chitty on Bills, 333; Rosher vs. Kieran, 4 Camp., 87.

acceptor his agent for that purpose, and we cannot perceive how they can be sustained on any other ground.¹ There are also cases which hold that the maker of a note may give notice;² but he like the acceptor is the principal debtor, and it is a departure from the whole theory of notice for the debtor to undertake to state to whom his creditor will look for payment. These cases have probably been founded on the too general language of the text-writers already referred to in the notes.

§ 12. Notice given by an agent is the same as if by the holder himself; and it may be either in the agent's name³ or in the name of another party.⁴ The notary to whom the bill or note has been given for presentment may, as the agent of the holder, give notice;⁵ but it is no part of his official duty;⁶ and a bank holding a bill or note for collection, or its officers or agents, should as a matter of duty, give the notice necessary.⁷ Any person, indeed, in whose hands the bill lawfully is, may give the notice as holder or agent, as the case may be; and, if as agent, a verbal authority from the holder is sufficient.⁸

§ 13. A banker with whom a bill or note is deposited to present for acceptance or payment, or any agent to whom it is indorsed for collection, is to be regarded as a distinct holder for the purposes of notice, and has the same time to notify his principal and the principal the prior parties as if such banker, or agent, were the real owner.⁹ The same rule applies to the several branch banks of the

¹Byles on Bills, (Sharswood's ed.,) 431-32; Bayley on Bills, 254, (5th ed.,) Thompson on Bills, 359, (Wilson's ed., 1865,) 1 Parsons' N. & B., 505.

²First National Bank *vs.* Ryerson, 23 Iowa, 508; Glasgow *vs.* Pratte, 8 Misso., 336.

³Woodthorpe *vs.* Lawes, 2 M. & W., 109.

⁴Rogerson *vs.* Hare, 1 Jur., 71; Harrison *vs.* Ruscoe, 15 M. & W., 231; Byles on Bills, (Sharswood's ed.,) 432.

⁵Smedes *vs.* Utica Bank, 20 Johns., 372; S. C., 3 Cowen, 662; Bank of Utica *vs.* Smith, 18 Johns., 230; Safford *vs.* Wyckoff, 1 Hill, (N. Y.) 11; Cowperthwaite *vs.* Sheffield, 1 Sandf., 416; Crawford *vs.* Branch Bank, 7 Alabama, 205; Shed *vs.* Brett, 1 Pick., 401; Fulton *vs.* MacCracken, 18 Md., 528; Renick *vs.* Robbins, 23 Misso., 339.

⁶Burke *vs.* McKay, 2 Howard, 66; Harris *vs.* Robinson, 4 Howard, 336.

⁷Ogden *vs.* Dobbin, 2 Hall, 112; Freemans Bank *vs.* Perkins, 7 Shepley, 292; Bank of State of Missouri *vs.* Vaughan, 36 Misso., 90.

⁸Story on Bills, § 303; Byles on Bills, (Sharswood's ed.,) 432; Cowperthwaite *vs.* Sheffield, 1 Sandf., 416.

⁹Friend *vs.* Wilkinson, 9 Grat., 31; Neal *vs.* Wyatt, 3 Humph., 125; Gindrat *vs.* Mechanics' Bank, 7 Ala., 324; Hill *vs.* Planters' Bank, 3 Humph., 670; Crocker *vs.* Getchell, 13 Maine, 392; Sussex Bank *vs.* Baldwin, 2 Harrison, 487; Bank United States *vs.* Goddard, 5 Mason., 366; Church *vs.* Barlow, 9 Pick., 547; Colt *vs.* Noble, 5 Mass., 167; Ogden *vs.* Dobbin, 2 Hall, 112; Howard *vs.* Ives, 1 Hill, (N. Y.,) 263;

same establishment¹. Upon the same principle where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man requesting him to ascertain the indorsers' residence, and received an answer with information on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th forwarded the letter containing notice of dishonor, it was held sufficient.²

The factor, or other agent or attorney, may not know which of the prior parties his principal may desire to hold bound to him; or he may not know where notice would find them, as he has no interest in the bill or note, or priority with the parties, and the rule placing such agents on the footing of a distinct holder; is essential to the convenient collection and management of negotiable paper.

§ 14. If the holder be dead his personal representative should give notice, if there be one; but if none be appointed at the time of maturity the indorser will not be discharged if notice be sent him in a reasonable time after an appointment is made.³

TO WHOM NOTICE OF DISHONOR SHOULD BE GIVEN.

§ 15. Each indorser of a bill, or note, is entitled to notice; and so also, is the drawer of a bill payable to a third party, as bills generally are. The acceptor of a bill and the maker of a note are not entitled to notice, they being the primary debtors.

The rule requiring notice to the indorsers of bills and notes, extends to all indorsers whether they are indorsers for value, or mere agents for collection. A Banking House,⁴ or other agent,⁵ merely passing title to the bill, or note, by indorsement for purposes of collection, stands on the same footing as any other indorser in respect to notice.

Mead vs. Engs, 5 Cowen, 303; *Sheldon vs. Benham*, 4 Hill, (N. Y.,) 129; *Eagle Bank vs. Hathaway*, 5 Metc., 213; *Lawson vs. Farmers' Bank*, 1 Ohio State, 206; *Langdale vs. Trimmer*, 15 East, 291; *Daly vs. Slater*, 4 Car. & P., 200; *Robson vs. Bennett*, 2 Taunt., 388; *Haynes vs. Birks*, 2 Bos. & P., 599; *Scott vs. Lifford*, 9 East., 347; *Byles on Bills*, (Sharswood's ed.,) 428; *Story on Bills*, (Bennett's ed.,) 292.

¹*Clode vs. Bayley*, 12 M. & W., 51.

²*Firth vs. Thrash*, 8 B. & C., 387 (15 E. C. L. R.); 2 Man. & Ry., 259. Lord Tenterden said: "A banker who holds a bill for a customer is not bound to give notice of dishonor on the day on which the bill is dishonored. He has another day; and upon the same principle, I think the attorney in this case was entitled by law, to be allowed a day to consult his client."

³*White vs. Stoddard*, 11 Gray; 1 Pars. N. & B., 444, 559.

⁴*McNeal vs. Wyatt*, 3 Humph., 125. See post.

⁵*Butler vs. Duval*, 4 Yerger, 265.

Although a bill, or note, is payable on demand, or has been indorsed long after it was due, there must still be a demand, and notice of default, in order to charge the indorser, because a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand.¹ This principle seems clearly correct, though it has been said that in such cases the party has a reasonable time within which to give notice;² and even that no notice at all is necessary.³

The transferrer of a negotiable instrument, who does not make himself a party, is not entitled to notice.⁴

§ 16. Notice to the agent of the party for the general conduct of his business is the same as if given to the principal in person.⁵ But notice to the party's attorney, or solicitor, unless he is specially authorized to receive it, is insufficient.⁶ If an agent draw a bill in his own name notice should be given to him, and if given to his principal it will be insufficient, he being no party to the paper.⁷ If the paper be signed by a duly authorized agent in the principal's name, notice should be given to the principal, who is the party liable.⁸ Whether or not the agent would be regarded as authorized to receive it, is questioned; and it has been decided that authority to indorse is not authority of itself to receive notice.⁹

§ 17. In cases of Partnership notice must be given to the firm—but notice to any one partner is notice to the firm.¹⁰ If an indorser be a member of the firm the notice to the firm is sufficient.¹¹ If there

¹Beebe *vs.* Brooks, 12 Calif., 308; Colt *vs.* Barnard, 18 Pick., 260; Bishop *vs.* Dexter, 2 Conn., 419; Berry *vs.* Robinson, 9 Johns., 121; Dwight *vs.* Emerson, 2 N. H., 159; Greeley *vs.* Hunt, 21 Maine, 455; Kirkpatrick *vs.* McCullough, 3 Humph., 171; Adams *vs.* Torbert, 6 Ala., 865; Lockwood *vs.* Crawford, 18 Conn., 361; Attwood *vs.* Hazledon, 3 Bailey, (S. C.), 457; McKinney *vs.* Crawford, 8 Sergt. & R., 351; Course *vs.* Shackelford, 2 Nott. & McC., 283; Branch Bank *vs.* Gaffrey, 9 Ala., 153; 1 Pars. N. & B., 520.

²Van Hoesen *vs.* Van Alstyne, 3 Wend., 75.

³Gray *vs.* Bell, 3 Rich., 71; O'Neill, J.; 1 Parsons N. & B., 519; note v.

⁴Van Wart *vs.* Wooley, 3 B. & C., 439.

⁵Crosse *vs.* Smith, 1 M. & Sel., 545; Wilkins *vs.* Commercial Bank, 6 Howard, Miss., 217.

⁶Louisiana State Bank *vs.* Ellery, 16 Mart., (La.), 87; Crosse *vs.* Smith, 1 M. & Sel., 545; Byles on Bills, (Sharswood's ed.), 498.

⁷Grosvenor *vs.* Stone, 8 Pick., 79.

⁸Clay *vs.* Oakley, 17 Mart., (La.), 137.

⁹Valk *vs.* Gaillard, 4 Strob., 99; Wilcox *vs.* Renth, 9 Smedes & M., 476.

¹⁰Bayley, 285; Story on Bills, §§299, 305; Story on Notes, §308; Chitty, 355; Gowan *vs.* Jackson, 20 Johns., 176; Peoples Bank *vs.* Keech, 26 Md., 521.

¹¹Rhett *vs.* Poe, 2 Howard, 457.

are joint indorsers, not partners, notice must be given to each of them, and notice to one only would not bind even him.¹ "If the drawer of a bill," said the Supreme Court in *Rhett vs. Poe*, 2 How., 473, "be in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer, need not be given. The knowledge of one partner is the knowledge of the other, and notice to the one notice to the other."

§ 18. If the party entitled to notice be dead at the time the bill or note becomes payable, and this is known to the holder, notice should be sent to his Executor, or Administrator, if there be any, and it can be ascertained by reasonable inquiry who or where he is; and under such circumstances notice addressed to the deceased by name would be insufficient.² Notice addressed to the "legal representative" in such case, would suffice;³ but it has been held that if addressed to "the estate" it would not, that term applying as well to the heir at law, as to the Executor or Administrator.⁴ Notice to one of several executors or administrators is sufficient.⁵

It is said however, that in all these cases reception by the personal

¹ *Peoples Bank vs. Keech*, 26 Md., 521; *Willis vs. Green*, 5 Hill, 232; *Shepard vs. Hawley*, 1 Conn., 368; *Boyd vs. Orton*, 16 Wisc., 495; *Dabney vs. Stidger*, 4 Smedes & M., 749; *State Bank vs. Slaughter*, 7 Blackford 133; *Union Bank vs. Willis*, 8 Metc., 512; *Bank of Chenango vs. Root*, 4 Cowen, 126; *Miser vs. Trooinger*, 7 Ohio St. R., 288; *Beals vs. Peck*, 12 Barb., 245; *Sayre vs. Frick*, 7 Watts & S., 383; *Story on Bills*, §199; *Wood vs. Wood*, 1 Harrison, 429; *Contra Dodge vs. Bank of Ky.*, 2 A. K. Marsh, 510; *Higgins vs. Morrison*, 4 Dana, 100.

² *Oriental Bank vs. Blake*, 22 Pick., 206; *Barnes vs. Reynolds*, 4 How., (Miss.) 114; *Cayuga Co. Bank vs. Bennett*, 5 Hill, 236; 1 *Parsons, N. & B.*, 501-2.

³ In *Boyd's Adm'r vs. City Savings Bank*, 15 Grat., 501, it appeared that Boyd, the indorser of the note, was dead when it became due, and was protested, and had no personal representative. He resided in Lynchburg at the time of his death, and his family continued to reside there until after the protest of the note. Notice of dishonor was on the day of protest deposited by the Notary in the post office at Lynchburg, directed to "The Legal Representative of James M. Boyd, deceased, Lynchburg;" and this was all the notice given. The Court of Appeals held that the notice was sufficient, saying that the legal representative (upon his qualification) was as likely to receive notice through this channel as if it had been left at the late residence of the deceased indorser; and that the former was preferable inasmuch as "the family of the deceased at the time of the protest, might be in a state of deep affliction (occasioned by his recent death) when it would be painful both to them and the Notary for him to have to visit them on a matter of business." *Pillow vs. Hardeman*, 3 Humph., 538; *Planters Bank vs. White*, 2 Humph., 112.

⁴ *Cayuga County Bank vs. Bennett*, 5 Hill, 236; *Massachusetts Bank vs. Oliver*, 10 Cush., 557. ⁵ *Beals vs. Peck*, 12 Barb., 245; *Lewis vs. Bakewell*, 6 La., Ann., 359.

representative in a reasonable time will be sufficient,—curing all defects in the sending.¹

If there be no personal representative, notice sent to the family residence of the deceased will be sufficient;² and it is likewise sufficient if notice be addressed to the deceased when, without negligence, the holder is not aware of his death.³ If notice is left at the family residence, no personal representative having been appointed, it will not be necessary when one is appointed to give him notice, the rights of the holder being fixed by his doing what the circumstances required when the paper fell due.⁴

§ 19. If the party be bankrupt it is best to give notice to him, and to his assignees also. If there be as yet no assignees appointed, notice to him is sufficient;⁵ and perhaps it might be sufficient even if they had been appointed.⁶ If given to the assignees alone, it would probably be sufficient.

If the bankrupt has absconded, notice should be given his assignees, if any there be;⁷ and if there be none, to any one representing his estate.⁸

TIME AT WHICH NOTICE SHOULD BE GIVEN.

§ 20. The language of the earlier authorities was that notice of dishonor should be given within a reasonable time, and the like expression is still sometimes met with;⁹ but the period allowed the holder is now so definitely limited and fixed that this phrase is entirely too loose and general to convey a correct idea of the requirements of the law.¹⁰

¹Cayuga County Bank *vs.* Bennett, 5 Hill, 236; 1 Parsons, N. & B., 502.

²Merchants Bank *vs.* Birch, 17 Johns, 25; Stewart *vs.* Eden, 2 Cain., 121.

³Barnes *vs.* Reynolds, 4 How., (Miss.) 114. ⁴Merchants Bank *vs.* Birch, 17 Johns., 25.

⁵Ex parte Moline, 19 Vesey, 216. ⁶1 Parsons, N. & B., 500.

⁷Rhode *vs.* Proctor, 4 B. & C., 517; 6 Dow. & R., 610. ⁸*Ibid.*

⁹Story on Bills, §285; 1 Parsons, N. & B., 507; Chitty on Bills, ch. 8, p. 366. There was formerly a statute in Virginia which allowed eighteen months as a reasonable time within which to give notice of protest of a bill of exchange. It was considered in Stott *vs.* Alexander, 1 Wash.; 335 [1794], in which case the bill was protested in September, 1787, and notice given in June, 1788, and the Court, by its President, Edmond Pendleton, said: "No facts being stated to take this case out of the general rule before mentioned, and established by the act of Assembly, we are of opinion that the notice is reasonable."

This statute was repealed in 1792, and is quoted as a curious relic. Both in England and Scotland formerly there was no fixed time within which it was necessary to give notice; the new rule is as certain as a statute. See Thomson on Bills, 346.

¹⁰1 Parsons, N. & B., 507.

It is certain that notice need not be given on the very day of dishonor, though the holder has the option to do so if he pleases;¹ and in point of fact it is usual for the holder or notary to prepare and send notice forthwith after dishonor. It is difficult to express a precise rule which will apply to all cases, and to fix definitely within what time after the day of dishonor the notice must be sent,—and it is to be determined by reference to the residence of the parties, the means and frequency of communication, and the time of departure of the mails or other conveyance by which notice may be transmitted.

§ 21. But where they reside in the same place the settled rule is that the holder has until the expiration of the following day to give notice; and he is not confined within the business hours of the day to give the notice at the party's dwelling.² He may give it there at any time before the hours of rest; but if he gives it at the place of business it must be done during the hours of business.³

§ 22. When the parties reside in different places, and there is mail communication between them, the rule laid down by the U. S. Supreme Court is, that the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided such mail is not closed before early and convenient business hours of that day; in which case it must be sent by the next mail thereafter.⁴

In other words, the notice must be sent by the first mail which leaves after the day of dishonor is past, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor.

This rule is sanctioned by numerous and eminent authorities, and

¹*Hine vs. Allely*, 4; *B. & Ad.*, 624 (24 E. C. L. R.); *Hume vs. Peploe*, 8 East, 169; *Ex parte Moline*, 19 Vesey, 216; *Coleman vs. Carpenter*, 9 Barr, 178; *Price vs. Young*, 1 McCord, 339; *Story on Bills*, §290; *Chitty on Bills*, chap. 10, p. 510; *Byles on Bills*, (Sharswood's ed.), 428; *Bank of Alexandria vs. Swann*, 9 Peters, 33; *Lenox vs. Roberts*, 2 Wheat., 373.

²*Jameson vs. Swinton*, 2 Taunt., 224; *Bayley on Bills*, 176.

³*Adams vs. Wright*, 14 Wisconsin, 408; *Cayuga Co. Bank vs. Hunt*, 2 Hill (N. Y.), 635; *Crosse vs. Smith*, 1 Maule & S., 545; *Garnett vs. Woodcock*, 6 Maule & S., 44; *Parker vs. Gordon*, 7 East, 385; *Allen vs. Edmundson*, 2 Carr. & K., 547; *Story on Bills*, §290.

⁴*Fullerton vs. Bank U. S.*, 1 Peters, 605; *Bank of Alexandria vs. Swann*, 9 Peters, 33; *Lenox vs. Roberts*, 2 Wheat., 373; *U. S. vs. Barker*, 12 Wheat., 559, 4 Wash., 465. These cases do not state the rule as broadly as laid down in the text, but they are not inconsistent with it as explained in the case of *Lawson vs. Farmer's Bank*, 1 Ohio State, 206—a most learned and instructive case on the subject of notice.

it seems to us adopts the only principle which may be safely followed in all cases.¹

Chancellor Kent has expressed the opinion that it would be sufficient to mail the notice at any time on the day after dishonor,² but this is a greater relaxation than the leading cases recognize, and is going further than necessary to extend a liberal time to the holder.³ In many cases it is said that notice must be sent by the mail of the next day after dishonor; but most of these cases, as observed by Professor Parsons, were cases which held that notice *so sent* is sufficient, which is undoubtedly true.⁴ "By the next practicable mail," after the day of dishonor, is the language adopted by a number of authorities,⁵ but they are not altogether concurrent in the definition of the phrase, and the rule of the text seems less susceptible than any other of misinterpretation, or of working injustice to any of the parties.

So that the notice goes by some mail of the day after dishonor, it is not material by which mail of that day, and that a mail left earlier than that by which notice was conveyed, makes no difference.⁶ Certainly, it must go by the mail of the next day (if it leave not too early as we have said); or if there be no mail next day, it must go by the next mail thereafter.⁷

§ 23. What hour of the next day after dishonor may be considered as reasonably early and convenient within the meaning of this rule must depend upon the habits of the business community in each place; and no precise hour can be arbitrarily named. If the mail closes before early business hours of the day after dishonor, whether

¹*Farmer's Bank vs. Duvall*, 7 Gill & J., 78; *Lawson vs. Farmer's Bank*, 1 Ohio State, 206; *Carter vs. Burley*, 9 N. H., 558; *Sussex Bank vs. Baldwin*, 2 Harrison, 487; *Wemple vs. Dangerfield*, 2 Smedes & M., 445; *Downs vs. Planters Bank*, 1 Smede & M., 261; *Mitchell vs. Cross*, 2 R. I., 437; *Burgess vs. Vreeland*, 4 N. J., 71; *Howard vs. Ives*, 1 Hill, (N. Y.), 263; *Hailford Bank vs. Stedman*, 3 Conn., 489; *Chick vs. Pillsbury*, 24 Maine, 458; *Eagle Bank vs. Chapin*, 3 Pick., 180; *Manchester Bank vs. Fellows*, 8 Foster, 302; 1 *Parsons, N. & B.*, 511; *Redfie'd & Bigelow's Leading Cases* 393; 1 *American Lead. Cases*, 390; *Story on Bills*, §288; *Darlishrie vs. Parker*, 6 East, 3; *Haynes vs. Birks*, 3 Bos. & Pull., 599.

²3 Kent Com., 106, note e.

³1 *Parsons N. & B.*, 508-9.

⁴1 *Parsons N. & B.*, 510, 511.

⁵*Haekell vs. Boardman*, 8 Allen, 40, in which case Bigelow C. J., said: "The rule is that notice should go by the next practicable post after the holder received notice of dishonor of the note."

⁶*Whitewell vs. Johnson*, 17 Mass., 449; *Lawson vs. Farmer's Bank*, 1 Ohio State, 206; *Howard vs. Ives*, 1 Hill, N. Y., 263; *Housatonic Bank vs. Lafin*, 5 Cush., 546; *Goodman vs. Norton*, 17 Maine, 381. ⁷*Knott vs. Venable*, 42 Ala., 186.

it be during the night before,¹ or at three,² four,³ five⁴ or six⁵ o'clock A. M., thereof, the notice need not, under the rule, be sent thereby. Seven o'clock seems debatable,⁶ at least the hour is not clearly within early business hours, unless at some particular localities; and sun-rise is certainly too soon.⁷

Of course three P. M. would be too late;⁸ and it has been held that where the mail closes at half past ten A. M., notice should have been sent by it,⁹ so where it closed at ten A. M.,¹⁰ and likewise where it closed at ten minutes past nine A. M.¹¹ But in another locality half past nine A. M., was thought unreasonably early;¹² while in another still it has been held that proof that the notice was deposited in the post at nine A. M., was insufficient.¹³

§ 24. Christmas day, Sunday,¹⁴ the Fourth of July¹⁵ or any day of public thanksgiving,¹⁶ or of religious festival,¹⁷ (upon which a man is forbidden by his religion to transact secular affairs) is counted out of the computation of time within which notice must be given. But notice is not invalid because given on the Fourth of July or other holiday;¹⁸ and although notice need not be forwarded until the day after dishonor or of its reception, still it is not irregular, or improper to do so if the party chooses, the time being allowed for his con-

¹See *Ante* §; *Ceill vs. Jeremy, Moody & M.*, 61.

²*Mitchell vs. Cross*, 2 R. I.

³*Wemple vs. Dangerfield*, 2 *Smedes & M.*, 445.

⁴*West vs. Brown*, 6 *Ohio State*, 542.

⁵*Chick vs. Pillsbury*, 24 *Maine*, 458; *Davis vs. Hanly*, 7 *Eng.*, (Ark.), 645.

⁶In *Stephenson vs. Dickson*, 24 *Penn. St.*, 7 o'clock was held not an unreasonably early hour; but in *Commercial Bank vs. King*, 3 *Rob.*, (La.) it was held certainly sufficient to show that notice was deposited on the post at seven o'clock.

⁷*Deminds vs. Kirkman*, 1 *Smedes & M.*, 644.

⁸*Seventh Ward Bank vs. Hanrick*, 2 *Story*, 416.

⁹*U. S. vs. Barker*, 4 *Wash. C. C.*, 464; 12 *Wheat.*, 559.

¹⁰*Haskell vs. Boardman*, 8 *Allen*, 38.

¹¹*Lawson vs. Farmers' Bank*, 1 *Ohio State*, 206.

¹²*Burgess vs. Vreeland*, 4 *New Jersey*, 71; so in England half past nine was held too early; *Hawkes vs. Salter*, 4 *Bing.*, 715; (13 *E. C. L. R.*;) *Byles on Bills*, 426.

¹³*Downs vs. Planters Bank*, 1 *Smedes & M.*, 261.

¹⁴*Byles on Bills*, (Sharswood's ed.,) 429; *Chitty on Bills*, (13th Am. ed.,) 551, 552; 1 *Par.*, N. & B., 515.

¹⁵*Cuyler vs. Stevens*, 4 *Wend.*, 566.

¹⁶*Byles on Bills*, (Sharswood's ed.,) 429.

¹⁷*Linds vs. Unsworth*, 2 *Camp.*, 602; *Martin vs. Ingersoll*, 8 *Pick.*, 1.

¹⁸*Deblieux vs. Bullard*, 1 *Rob.*, (La.) 66; in this case it was said it might be given on Sunday.

venience.¹ If notice is received on Sunday it need not be forwarded until the Tuesday following as he is not bound to open the letter containing it, or to recognize it until Monday;² and if received on Saturday it need not be forwarded until Monday.³

EACH HOLDER HAS A DAY.

§ 25. The party receiving the notice may desire to communicate it to parties antecedent to him, and others before him likewise to transmit it to those antecedent to them. In such cases, the general rule, also, is that each successive party who receives notice of dishonor is entitled to a full day to transmit it to any antecedent party who is chargeable over to him upon payment of the bill or note.⁴ So that, if a party receives notice on one day he is not bound to forward it to a prior indorser until the next day, and not then if the mail leaves before early business hours.

Upon receiving notice of dishonor the indorser should—if there be prior parties whom he wishes to hold liable—immediately notify, not only the one immediately antecedent to him, but all of them; for otherwise by the negligence of his previous indorser, or of some one of the successive indorsers, he may lose recourse against some or all of them but the one notified by him.

§ 26. The over-diligence of one party to a bill or note in giving notice can not supply the lack of diligence in another; and though the drawer or indorser sought to be charged, received, the notice as early as he would have been entitled to it had it passed in due course through the intermediate parties; yet the holder in order to bind him must show due diligence in each and every one of such intermedi-

¹*Bussard vs. Levering*, 6 Wheaton, 102; *Lindenberger vs. Beall*, 6 Wheaton, 104; *Curry vs. Bank of Mobile*, 8 Porter, (Ala.), 360; *McClane vs. Fitch*, 4 B. Monroe, 599; *Coleman vs. Carpenter*, 9 Penn. State, 178; *Haslett vs. Ehrick*, 1 Nott & McC., 1.6; *Corp vs. M'Comb*, 1 Johns. Cas., 328; *Smith vs. Little*, 10 N. H., 526; *Lawson vs. Farmers' Bank*, 1 Ohio State, 206.

²*Bayley on Bills*, 172; *Bray vs. Hadwen*, 5 Maule, 68; 1 *Parsons, N. & B.*, 515; *Wright vs. Shawcross*, 2 Barn. & Ald., 501, note; *Haynes vs. Birks*, 3 B. & P., 599; *Chitty on Bills*, (13 Am. ed.,) 551.

³*Howard vs. Ives*, 1 Hil', 263; *Friend vs. Wilkinson*, 9 Grat., 31.

⁴*Jameson vs. Swinton*, 2 Taunt., 224; *Geill vs. Jeremy*, 1 Mood. & Malk., 61; *Rowe vs. Tipper*, 13 C. B., 249; *Lawson vs. Farmers' Bank*, 1 Ohio State, 206; See 1 *Pars., N. & B.*, 513, and cases cited; *Story on Bills*, § 291; *Byles on Bills*, (Sharswood's ed.,) 430; *Smith vs. Mercantile Law*, 149; *Simpson vs. Turney*, 5 Humph., 419.

ate parties.¹ "If," said Tucker, P., in *Brown vs. Fergusons*, 4 Leigh., 37, "there be a defect in any link of the chain of notices it is fatal to the holders demand. We can not eke out the under-diligence of one party by the over-diligence of another * *; for as the recourse of any immediate indorser against those who lie behind him arises from his own liability to pay the bill to him to whom he passed it, the laches which takes away his liability takes away theirs also." Nor can any party by waiving his own discharge and paying the bill or note, waive the discharge of antecedent parties.²

§ 27. In the case of a foreign bill protested in one of the United States, and the party entitled to notice resides in some other nationality, it is sufficient to send notice by the first regular ship; and it is no objection that if sent by a chance ship it would reach him sooner.³ It should be sent by the ship going to the port at which the party resides, or to some neighboring or convenient port according to the usual course of transportation of letters of business, if a reasonable time before its departure is left for writing and forwarding the notice.⁴

If the party delay sending notice until after a regular ship to the place where notice is addressed has departed sending it by the next ship will be too late unless the delay be excused by circumstances.⁵

¹*Brown vs. Fergusons*, 4 Leigh, 37; *Simpson vs. Turney*, 5 Humph., 419; *Smith vs. Roach*, 7 B. Monroe, 17; *Whitman vs. Farmers' Bank*, 8 Porter, (Ala.), 258; *Etting vs. Schuylkill Bank*, 2 Barr., 355; *Fitchburg Bank vs. Perley*, 2 Allen; 433; *American Life Ins. Co. vs. Emerson*, 4 Smedes & M., 177; *Carter vs. Burley*, 9 N. H., 558; *Manchester Bank vs. Fellows*, 8 Foster, 302; *Kennedy vs. Geddes*, 8 Porter, (Ala.), 263; *Rowe vs. Tipper*, 13 C. B., 249, (76 E. C. L. R.); 1 Pars., N. & B., 514; *Story on Bills*, § 294.

²*Turner vs. Leach*, 4 B. & Ald., 451, (6 E. C. L. R.)

³*Muilman vs. D'Equino*, 2 H. Black, 565; *Darbishire vs. Parker*, 6 East., 3. In *Stainback vs. Bank of Virginia*, 11 Grat., 260; a bill drawn by a house in Petersburg, Va., on a house in London was protested for non-acceptance on 5th April, 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th and notice of dishonor was sent by it. At that time the Cunard line carried the mail between the two countries under a contract with the British Government, and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London P. O., and such packets sailed from London, or Liverpool on the 7th, 10th and 17th of April, 1843. But it was probable that the steamer of the 19th would arrive before any of them. The notice was held duly transmitted, *Samuels J.* saying that any other course would have sacrificed the object of the law. *Bytes on Bills*, (Sharswood's ed.,) 421; *Bayley on Bills*, 179.

⁴*Story on Bills*, § 286; 1 Pars., N. & B., 485, note.

⁵*Le 10x vs. Leverett*, 10 Mass., 1.

HOW GIVEN WHEN PARTIES RESIDE IN SAME PLACE.

§ 28. When the parties reside in the same city or town, the party is as a general rule, entitled to personal notice verbal or written, or a written notice must be left at his dwelling-house or place of business. And notice by mail in such a case, will be insufficient;¹ unless its reception in due time be proved,² but if the instrument was protested by a notary at a place different from that of the parties' residence the mail may then be used.³ And the notice may be deposited in the post-office at the place of protest, or at the place of the indorser's residence, if in due season.⁴

This at least is the rule in America, and may be regarded as the law in all of the States, except where it has been changed by statute, or some modification has been made by the courts in consequence of the growth of large cities. In London, and in England indeed, the use of the post-office is recognized as the proper means of transmission to a party residing in the same place, the rule growing out of the speedy delivery of communications by mail and by the convenient arrangements of the postal service.⁵ In our large commercial cities the English rule is equally applicable, and in New York it has been adopted by statute. The requirement that notice should be sent otherwise than by post "has lost its reasonable force and exists only by authority;"⁶ and the courts are indisposed to extend it. In Scotland the post is used in Edinburgh for this purpose.⁶

USE OF THE PENNY POST.

§ 29. The rule is subject to the exception in the United States that in cities where there is a penny-post, or a free post established and regulated by laws adapted to secure the prompt delivery of the

¹Bowling *vs.* Harrison, 6 Howard, 248; Williams *vs.* Bank U. S., 2 Peters 96; Buscard *vs.* Levering, 6 Wheat., 104; Nashville Bank *vs.* Bennett, 1 Yerger, 166; Boyd *vs.* City Savings Bank, 15 Grat., 501; Pierce *vs.* Pendar, 5 Metcalf, 352; Shellburne Falls National Bank *vs.* Townsley, 102 Mass., 177; Story on Bills, § 312; 1 Pars., N. & B., 482; Byles on Bills, (Sharswood's ed.,) 422.

²Cabat Bank *vs.* Warner, 10 Allen, 524.

³Hartford Bank *vs.* Stedman, 3 Conn., 489; Manchester Bank *vs.* Fellows, 8 Foster, 302; Warren *vs.* Gilman, 17 Maine, 360; Greene *vs.* Farley, 20 Ala., 322; Eagle Bank *vs.* Hathaway, 5 Metc., 212.

⁴Foster *vs.* McDonald, 8 Ala., 376; Timms *vs.* Delisle, 5 Blackt., 447; Contra M'Crummen *vs.* M'Crummen, 17 Mart., (La.,) 158; Patrick *vs.* Beasley, 6 Howard (Miss.,) 609. ⁵1 Parsons, N. & B., 481.

⁶1 American Lead., Cas., 403; 1 Parsons N. & B., 484; Redfield & Bigelow Lead., Cas., 381; Eagle Bank *vs.* Hathaway, 5 Met., 212. ⁷Thomson on Bills, 339.

mails; and especially if it be a local custom to send notices by that means, it will be sufficient to use it for that purpose.¹ And where there are several distinct villages, or post-offices in a town, between which there is a regular intercourse by mail, it may be employed for the conveyance of notice, notwithstanding the fact that the parties reside in the same general municipality.²

And where the indorser resided in the same city, but ten miles from the place of protest, it has been held allowable to use the post, there being at his place of residence an office at which it was not shown that he did not receive his mail.³

Where the parties reside in the same town or city, and the penny-post is employed for the communication of notice, it is necessary, according to the English cases, that notice should be deposited in the post in such season that it will be received in due course of delivery on some part of the next day.⁴

TO WHAT PLACE THE NOTICE SHOULD BE SENT.

§ 30. If the notice is not to be given to a party to whom it is necessary or allowable to transmit it by mail, it should be sent to or given at his place of domicile, or place of business; and delivery of notice at either will be sufficient;⁵ even when they are in different towns.⁶ When the party keeps a counting room or other business, and has a private residence also, it is usual to send notice to the place of business rather than to the dwelling; and if notice is so sent to his place of business during hours when he or some of his people might be reasonably expected there, it is sufficient; it is not necessary to

¹*Shoemaker vs. Mechanics' Bank*, 59 Penn. State, 79; *Walters vs. Brown*, 15 Md., 285; *Pierce vs. Pendar*, 5 Met., 352; *Ransom vs. Mack*, 2 Hill, 587; *Story on Bills*, §§ 289, 291, 382; 3 Kent, Com., 107; *Bank of Columbia vs. Lawrence*, 1 Peters, 578; see opinion of Thompson, J., *infra*.

²*Shaylor vs. Mix*, 4 Allen, 351; *Farmers' Bank vs. Butler*, 3 Littell, 498; *Curtis vs. State Bank*, 6 Black., 312; *Brindley vs. Barr*, 3 Harring, (Del.) 419; *Gist vs. Lybrand*, 3 Ohio; 307 Louisiana State Bank vs. Rowel, 18 Mart., (La.) 506; *Bell vs. Hagerstown Bank*, 7 Gill, 216.

³*Paton vs. Lent*, 4 Duer, 231; *Bendurant vs. Everett*, 1 Metcalf, 618; *Barret vs. Evans*, 28 Missouri, 331.

⁴*Smith vs. Mullett*, 2 Camp., 208; *Dobree vs. Eastwood*, 3 Car. & P., 250

⁵*Story on Bills*, § 297; 3 Kent, Com., 106; 1 Parsons N. & B., 488, 489; *Ireland vs. Kip*, 10 Johns., 491; *Vetchten vs. Pruyn*, 3 Kernan, 549; *Bank of Columbia vs. Lawrence*, 1 Peters, 578; *Williams vs. Bank U. S.*, 2 Peters, 96; *Sanderson vs. Reinstadler*, 31 Missouri, 483; *Nevins vs. Bank*, 10 Michigan, 547; *Grinman vs. Walker*, 9 Iowa, 426.

⁶*Bank of Geneva vs. Howlett*, 4 Wend., 328; *Donner vs. Remer*, 21 Wend., 10.

leave a written notice, or to send to the house where he lives.¹ This has been doubted, and while the law is to this effect, in our judgment, it might be safer to send the notice to the residence when no one is found at the place of business.²

When the party has two or more places of business in the same town, the holder may send notice to either.³

§ 31. Notice left with a clerk at the party's place of business in his absence,⁴ or at his place of business without proof as to the person with whom it was left,⁵ is sufficient: and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place.⁶

If the party be not found at his dwelling, it is sufficient to leave notice with his wife,⁷ or with any other person on his premises.⁸ A verbal message left at the party's house with his wife has been held sufficient,⁹ and the certificate of the Notary, "left at his house at ———," would answer the requirements of the law.¹⁰

§ 32. A room where a party is accustomed to resort, but where he carries on no trade or employment, is not his place of business;¹¹ and it has been held that the fact that the indorser occupied a room in another's house for settling up his former business, and there kept his books of account, and received his correspondence, did not constitute it his place of business.¹² It will not be sufficient merely to leave notice in the building in which the party transacts business—it must be at his very place of business;¹³ nor to leave it at the store of

¹Bayley on Bills, p. 176; *Crosse vs. Smith*, 1 Maule & S., 545; *Goldsmith vs. Blane*, 1 Maule & S., 551; *Bancroft vs. Hale*, Holt, 476; *Allen vs. Edmundson*, Car. & K., 547; *Sory on Bills*, §300; *Byles on Bills*, (Sharwood's ed.) 423; *Lord vs. Appleton*, 15 Maine, 579; *State Bank vs. Hennen*, 16 Mart., La., 226. ¹¹*Parsons N. & B.*, 488.

²*Phillips vs. Alderson*, 5 Humph., 403; *Commercial Bank vs. Strong*, 28 Vt., 316.

³*Edson vs. Jacobs*, 14 La., 494; *Commercial Bank vs. Gove*, 15 La., 113.

⁴*Bank of Louisiana vs. Mansaker*, 15 La., 115; *Mechanics Banking Association vs. Place*, 4 Duer, 212. ⁵*Jacobs vs. Town*, 2 La., Ann., 964.

⁶*Blakely vs. Grant*, 6 Mass., 386; *Fisher vs. Evans*, 5 Binney 542.

⁷*Cromwell vs. Hynson*, 2 Esp., 511; *Honsego vs. Crowne*, 2 M. & W., 348.

⁸*Honsego vs. Crowne*, 2 M. & W., 348, in which *Bollana, B.* said: "A person not a merchant who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it becomes due."

⁹*Adams vs. Wright*, 15 Wis., 408, but it was held in this case that proof that notice was left with a boy in the yard, who said that he was the indorser's son, and who went toward the house, was insufficient.

¹⁰*Stephenson vs. Primrose*, 8 Porter, Ala., 155.

¹¹*Bank of Columbia vs. Lawrence*, 1 Peters, 578.

¹²*Kleinman vs. Boernstein*, 32 Missouri, 311.

the son of the indorser—the latter residing in the same building, but having a usual place of business elsewhere.¹

§ 33. If the party lodge at a private boarding house, it is to all intents and purposes his dwelling; and if notice be delivered there to the proprietor, or to a servant of the house, or to a fellow-boarder in the absence of the party himself, it is sufficient.² If the party lodge at a public house, and the notary, after inquiry, learns that he is not in, it will suffice to leave notice at his room or at the door of his room;³ and it seems that it will suffice to leave notice for a guest at a hotel with the bar-keeper or other attendant.⁴ But in all cases the guest should be inquired for first. If it do not appear that he was really at the hotel, or that the notary inquired for him, or left notice with some competent person for him, the defect would be fatal.⁵ It would not suffice to leave notice with another guest at a hotel.⁶

NOTICE.

§ 34. According to one class of cases all persons are to be regarded as of the same place who receive their mails through the same post-office; and although the party entitled to notice may in fact have his residence several miles distant in the country, do not admit the post-office in the city or town where he gets his mail matter, and where the holder is, to be used as a means of communicating notice. They base the decision upon the doctrine that the mail is to be used as a means of *transmission* only, and not as a place of deposit.⁶

¹Bank of U. S. *vs.* Corcoran, 2 Peters 121. In which case the Court said: "The store of the son was as distinct and separate from the father as if they had been under different roofs. The former was entered from the street, the latter from an alley or passage; and it does not appear that there was any inside communication between the two. * * The service of the notice was no more a compliance with the requisition of law than if it had been delivered to the son in the street or elsewhere, or left at his dwelling house."

²Bank U. S. *vs.* Hatch, 6 Peters, 250. In which case the Court said: "This is not like the case of a public inn; and a delivery to a mere stranger who happens to be there in transitu, and can not be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of life as this." See also *Stedman vs. Gooch*, 1 Esp. R., 4; *McMurtrie vs. Jones*, 3 Wash. C. C., 206; *Miles vs. Hall*, 12 Smedes & M., 332.

³*Howe vs. Bradley*, 19 Maine, 81.

⁴*Bradley vs. Davis*, 26 Maine, 45; *Dana vs. Kemble*, 19 Pick., 112; *Graham vs. Sangston*, 1 Md., 59.

⁵*Ash'ey vs. Gunton*, 15 Ark., 415.

⁶Bank U. S. *vs.* Hatch, 6 Peters, 250.

⁷In *Shelldone Falls National Bank vs. Townsley*, 102 Mass., 177, it is said: "The post office is not a place of deposit for notice to indorsers except where the notice is to be transmitted by mail to another office." *Farmer's Bank vs. Battle*, 4 Humph., 86. See also *Eagle Bank vs. Hathaway*, 5 Met., 212; *Ransom vs. Mack*, 2 Hill, 587.

Thus, in Tennessee, it was held that where notice of protest in Nashville, where the note was payable, was mailed there to the indorser, who resided seven and a half miles distant, was not sufficient, although he transacted his business at Nashville and received his mails there.¹

But where the party has no regular place of business in the city or town where the holder resides or the instrument is payable, and resides some distance in the country, but receives his mails there; the mere fact that he would get the letter out of the same office it was put in, instead of a distant one, should not vitiate the method of communication, every reason of convenience and certainty which apply in one case applying with equal force in the other. The Supreme Court of the United States has adopted this view in preference to the more exacting view of the authorities referred to; and has held that where the plaintiff's bank at which the note was payable was located in Georgetown, and the indorser, when the note fell due, resided two or three miles distant in the country, having removed after it was made from Washington City, but received his letters through the Georgetown P. O., notice deposited in the Georgetown P. O., addressed to him at that place, was sufficient.²

¹Barker vs. Hall, Mar. & Yerger, 183.

²In the case of Bank of Columbia vs. Lawrence, 1 Peters, 578, the Court, Thompson, J., said: "The indorser who had removed to the country from Washington, as stated in the text, continued the owner of the house in Washington in which he had formerly lived, and which was in the occupation of his sister-in-law. He was accustomed to go there two or three times a week; and it appeared that he was employed in winding up his business there, and settling accounts; that his books were kept there; and his bank notices were sometimes left there; and also that his newspapers and foreign letters were sent there for him. His coming to Washington and employing himself as stated, was generally known to those having business with him. It was contended that notice should have been sent to Washington by the Plaintiff's Bank located at Georgetown; but the Court thought the method adopted the proper one; and Thompson, J., said: " * * * * If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place, would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business carried on, but merely occasional employment there two or three times a week in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles

HOW NOTICE TRANSMITTED, WHEN PARTIES RESIDE IN DIFFERENT PLACES.

§ 35. When the parties reside in different places it will be sufficient for the holder to put notice of dishonor in the post-office addressed to the party entitled thereto, within the proper time. This

distant from that place, in the county of Alexandria. The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance; and, whether the notice reaches the party or not, the holder has done all that the law requires of him. It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being the usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside, in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence. In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual course of receiving letters, which must determine sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, can not affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is no showing that this

done his duty is discharged, and it is not necessary that the notice should be received,—the holder not being responsible for any mis-carriage of the mail.¹

WHEN SPECIAL MESSENGER MAY BE EMPLOYED.

§ 36. The holder is not bound to send notice by mail; and he may if he pleases in all cases send it by a special messenger.² In such cases it will be sufficient if the notice reaches the party entitled thereto on the same day that it would have reached him in due course

occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the Court which have suggested any limits to the distance from the post-office within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the Court, and the notice held sufficient: 16 Johns., 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom if ever occur; and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expense of serving notice by a special messenger. The case of *Pearson vs. Crallan*, 2 Smith, 404; *Chitty*, 222, n., is one of this description. But in that case, the Court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable. We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the Court erred in refusing so to instruct the jury. Judgment reversed, and *venire facias de novo* awarded."

¹*Bussard vs. Levering*, 6 Wheat.; *Lendenberger vs. Beale*, 6 Wheat., 104; *Munn vs. Baldwin*, 6 Mass., 316; *Cabat Bank vs. Warner*, 10 Allen, 524; *Shelburne National Falls Bank vs. Townsley*, 102 Mass., 177; *Miller vs. Hackley*, 5 Johns., 375; *Ellis vs. Commercial Bank*, 7 How., Miss., 294; *Friend vs. Wilkinson*, 9 Grat., 31; *Sanderson vs. Judge*, 2 H., B. C., 509; *Woodcock vs. Houldsworth*, 16 M. & W., 126; *Chitty on Bills*, 658; *Story Prom. Notes*, §328; *Story on Bills*, §300; 1 *Parsons N. & B.*, 478; *Byles on Bills*, (Sharswood's ed.), 418.

²*Bank of Columbia vs. Lawrence*, 1 Peters, 578; *Pearson vs. Crallan*, 2 J. P. Smith, 404; *Doobree vs. Eastwood*, 3 C. & P., 250, (14 E. C. L. R.)

of mail, although later, if within business hours;¹ but if it arrives the day after, and the delay is not explained and excused, it will be fatal.² And the holder is responsible if his messenger do not deliver the notice within the necessary time, and the party is discharged,³—unless there were no public means of communication and the holder exercised reasonable care in selecting his messenger.⁴

It has been held in some cases that where the party entitled to notice resides at a point remote from any post-office the holder must send notice by a special messenger.⁵ But it seems to us that it could not be reasonably expected of the holder to send notice to a party exiled from communication with the world;—or reasonable to presume that the party did not at convenient periods inquire at the nearest post-office—and that sending the notice to such post-office is all that should be required.⁶ When the messenger was necessary, or most convenient, his reasonable expenses are chargeable to the party receiving notice.⁷

§ 37. If the party addressed receives the notice, or it can be properly inferred by the jury from the facts of the case that it was received, the mere manner of its transmission is wholly immaterial.⁸ A personal service of notice is good wherever it may be made. If left at an improper place it is sufficient if it reaches the party for whom it was intended in due season;⁹ and so likewise if it be sent by mail where the parties reside in the same place it is good if it duly reaches the party addressed.¹⁰

The distinction between the different modes of giving notice is this: that where the holder and indorser reside in different places, the former, if he deposits the notice in the post office in due season, has no further burden on him as to the actual receipt of it by the latter; but where both parties live in the same town the sender of the notice is bound to show that it was actually received by the in-

¹*Bancroft v. Hale*, Holt, 476.

²*Jarvis v. St. Croix Man. Co.*; 23 Maine, 287; *Darbishire v. Parker*, 6 East, 3; *Byles on Bills*, (Sharswood's ed.), 421.

³*Van Vetchen v. Pruyn*, 3 Kernan, 549.

⁴1 *Parsons N. & B.*, 479.

⁵*Fish v. Jackson*, 1 Appleton, 467; *Farmer's Bank v. Butler*, 3 Little, 498; *Bedford v. Hickman*, 1 Yerger, 166.

⁶*State Bank v. Ayres*, 2 Halsted, 130; 1 *Parsons N. & B.*, 480.

⁷*Pearson v. Crallan*, 2 J. P. Smith, 404.

⁸*Hyslop v. Jones*, 3 McLean, 69.

⁹*Bank of United States v. Corcoran*, 2 Peters, 121; *Foster v. McDonald*, 5 Ala., 376; *Manchester Bank v. Fellows*, 8 Foster, (N. H.), 302; *Whiteford v. Burckmeyer*, 1 Gill, 127; *Bradley v. Davis*, 26 Maine, 45; *Cabat Bank v. Warner*, 10 Allen, 524.

¹⁰*Ibid.*

dorser in due season.¹ The telegraph, as yet unemployed in transmitting notice of dishonor of commercial paper, might be made available, and useful for that purpose;² but the proof of its due reception would be necessary, as communication by that channel does not stand on the same footing as that by mail.

TO WHAT POST-OFFICE NOTICE SHOULD BE DIRECTED WHEN SENT BY MAIL.

§ 38. The notice should be directed to the post-office at, or nearest to, the party's place of residence, unless he is accustomed to receive his letters at another post-office, in which case it should be directed thereto.³ If he live at one place and has his place of business at another, notice may be sent to either;⁴ and the place where the party actually resorts to for his letters is always the appropriate one, when known, for notice to be addressed to, whether or not the party live there or has his place of business.⁵ If the place be that of his actual residence at the time it need not be his domicile.⁶

§ 39. The indorser has a right to direct to what postal address, or to what place, notice shall be sent, and it will always suffice to pursue it although he may have a place of residence or business elsewhere.⁷ Sometimes the place to which he desires notice to be sent is designated by memorandum on the instrument, as, for example, by writing the words "214 E. 18th street,"⁸ or by adding his address to his signature, as for instance, "Memphis, Tenn.,"⁹ and he thereby impliedly directs notice to be sent to the place designated.¹⁰

§ 40. It is not sufficient to direct notice generally to a parish,

¹Cabat Bank *vs.* Warner, 10 Allen, 522.

²1 Parsons N. & B, 487.

³Bank of Columbia *vs.* Lawrence, 1 Peters, 582; Bank of Geneva *vs.* Howlett, 4 Wend., 328; Mercer *vs.* Lancaster, 5 Barr., 160; Jones *vs.* Lewis, 8 Watts & Sergt., 14.

⁴Bank U. S. *vs.* Carneal, 2 Peters, 540; Williams *vs.* Bank U. S., 2 Peters, 96; Cuyler *vs.* Nellis, 4 Wend., 398; Reid *vs.* Payne, 16 Johns., 218; Montgomery Co. Bank *vs.* Marsh, 3 Selden, 481.

⁵See Ante note 1; 1 Pars., N. & B., 498, and cases cited.

⁶Young *vs.* Durgin, 15 Gray, 264.

⁷Eastern Bank *vs.* Brown, 17 Maine, 356; Crowley *vs.* Barry, 4 Gill, 194; Bell *vs.* Hagerstown Bank, 7 Gill, 216; Bank of Columbia *vs.* Magruder, 6 Harris & J., 172; Carter *vs.* Union Bank, 7 Humph., 548; Tyson *vs.* Oliver, 43 Ala., 455.

⁸Bartlett *vs.* Robinson, 39 N. Y., 187; see also Davis *vs.* Bank of Tennessee, 4 Sneed, 390. ⁹Carter *vs.* Union Bank, 7 Humph., 548.

¹⁰See also Baker *vs.* Morris, 25 Barbour, 138; Davis *vs.* Bank of Tennessee, 4 Sneed, 390; Farmers' Bank *vs.* Balth, 4 Humph., 86.

county, or township within which there are a number of post-offices; but it has been held that it was sufficient to direct notice to the party at the shiretown of the county although there was a post-office nearer to him which he was in the habit of using.² Where there are two post-offices in the town where the party resides notice may be directed to the town generally, unless the holder knows, or should know, that he receives his letters at one of them, in which case notice should be directed there.³

§ 41. If the party live in one place and have his place of business at another the holder should send notice to the place at which he usually receives his letters;⁴ but if the holder does not know that he usually receives at the place where he is engaged in business it will be sufficient to send it to the place where he lives.⁵

When the party has his residence part of the year at one place and part at another notice may be sent to either,⁶ at least when the holder does not know, or is not to be charged with knowledge that he is accustomed to receive his letters at one of them.⁷ But in the case of a temporary sojourn, as for the summer, at a watering place, country place, or village, the notice should be sent to the place of the party's permanent residence.⁸

§ 42. When a party about to be absent directs notice to be sent to him at a place distant from his residence, so that its transmission thither and thence to the prior parties will occupy more time than if the notice had passed through the ordinary place of residence, a notice to him at the substituted and more distant place will not only be a good notice against him but as well against all prior parties.⁹

But when the party goes to a place distant from his residence for the purpose of a business negotiation which will occupy a few weeks, it

¹*Beckel vs. Tourbillon*, 6 Rob., (La.) 500.

²*Weakly vs. Bell*, 9 Watts, 273; *Story on Bills*, § 297; 1 Pars., N. & B., 497. In *Bank U. S. vs. Lane*, 3 Hawks., 453, the notice was sent to the Shiretown to the indorser, who was the high sheriff then in attendance at court; and it was held sufficient, although neither his residence nor post-office was at that place.

³*Morton vs. Westcott*, 8 Cush., 425; *Cabot Bank vs. Russell*, 4 Gray, 167; *Bank of Manchester vs. Slason*, 13 Vt., 334; *Downer vs. Remer*, 21 Wend., 10.

⁴*Montgomery Co. Bank vs. Marsh*, 3 Selden, 481.

⁵*Seneca Co. Bank vs. Neass*, 3 Comstock, 442; 5 Denio., 329.

⁶*Exchange, &c., vs. Boyce*, 3 Rob., (La.) 307.

⁷The notice should be sent where it is most likely to reach the party as said in *Couteau vs. Webster*, 6 Metc., 1.

⁸*Runyon vs. Mountfort*, Busbee, 371; *Stewart vs. Eden*, 2 Caines, 121.

⁹*Shelton vs. Brathwaite*, 8 M. & W., 252; *Byles on Bills*, (Sharswood's ed.,) 422.

would be insufficient to send notice there without instructions to do so.¹

§ 43. In the case of parties residing temporarily in a certain place—members of Congress or of the Legislature residing at their respective capitals, while the bodies to which they belong are in session, for instance—it is sufficient and proper that notice should be sent to them at such place or left there at their place of residence;² but after the adjournment of the session the rule would no longer apply, and notice should be sent to the party's permanent place of residence.³ And while Congress is in session it will not be sufficient to deposit notice for the member in the post-office of the Senate or House of Representatives.⁴

It has been held that even when the indorser who was a member

¹Walker vs. Stetson, 14 Ohio State, 89.

²Chouteau vs. Webster, 6 Metc., 1; Graham vs. Sangston, 1 Md., 59; Marr vs. Johnson, 9 Yerger, 1; Contra Walker vs. Tunstall, 3 Howard, (Miss.) 259, 2 Smedes & M., 638.

³Bayley's Adm'r vs. Chubb, 16 Grat., 284. In this case it was held that where notice was left at the dwelling house of a member of Congress in Washington, after the adjournment of Congress, and after he had left the city, and it appeared that he kept up his domicile in the District he represented, and it was his habit to leave Washington directly after Congress adjourned, it was insufficient. Daniel J., who delivered the opinion of the Court distinguished this case from that of P. Chouteau vs. Daniel Webster, 6 Metc. R., 1, in which a notice sent to Mr. Webster while he was a Senator, and *the Senate was in session*, was held sufficient; so he said "in the case of Graham vs. Sangston, 1 Md. R., 59, the indorser at the time of the maturity of the bill was a member of the general assembly of Maryland, then in session, and boarded at a hotel in Annapolis, and the notary gave notice by leaving the notice at the room of the indorser in the hotel; but whether the indorser was in Annapolis on the day that the notice was given did not appear; nor was there any proof in respect to the general domicile of the indorser. The notice was held sufficient."

The Judge referred also to Walker vs. Tunstall reported in 3 Howard, Mis. R., 259, and in 2 Smedes & Marsh. R., 638, as opposed to Chouteau vs. Webster, and the result of which decision is that "notice sent to a member of Congress who has no known place of residence, is good if directed to Washington whilst Congress is in session, and he is there engaged in the discharge of his official duties; but that such notice is not sufficient if he has a known place of residence, except upon a failure of the notary to ascertain the residence after having used due diligence to ascertain it."

"And," he added, "It seems to me that the rule declared in Chouteau vs. Webster is the more reasonable one; but I do not feel disposed to extend it still farther than any case has gone yet, and make it embrace a notice sent to a member of Congress at Washington after the adjournment of Congress, and after the member had in fact left the city. The presumptions which uphold the notice during the session of Congress seem to me to have nothing to sustain or justify them after that body has adjourned. The presumption is then the other way."

⁴Hill vs. Norvell, 3 McLean 583.

of Congress was known to be in Washington notice sent to his residence was sufficient.¹

§ 44. Where there are two,² or three³ post-offices at which the indorser is in the habit of receiving his letters notice may be sent to either; and where he lives at equi-distance from two post-offices notice addressed to one will suffice although he was accustomed to receive his letters at the other;⁴ where the party lives in the United States it is especially important in sending notices by mail to put the full address, town and state, as there are many cases in which the same name is applicable to towns and cities in different states. An omission to name the state where there is more than one place bearing the name of the town would be fatal if the notice were not duly received at the right place.⁵

§ 45. It is not in general sufficient to address the notice to a person at a large town, as for instance to "W. Haynes, Bristol,"⁶ without specifying in what part of it he resides; but if the party has so stated his address or direction on the bill or note, as for instance, "W. Moors, Manchester,"⁷ or "T. M. Barron, London," it would be sufficient to follow it. At least a jury might infer due notice.⁸

If the party hold himself out as resident in a certain place he is estopped from afterwards denying it, and notice sent there is sufficient;⁹ but if a party about to absent himself informs the holder where he is going notice should be sent to the place mentioned.¹⁰

If no one be found at the party's place of residence a notice put in the key-hole is sufficient.¹¹

§ 46. The place of date of a bill is not conclusive evidence that the drawer resides there, and is therefore an unsafe guide to the party sending notice; much less can it be relied upon as indicating the place of residence of an indorser. But it is *prima facie* evidence that the drawer resides there, and unless met with proof to the contrary notice sent to the drawer at the place of date of the bill would be sufficient. In England it has been held that sending notice to the drawer ad-

¹Marr vs. Johnston, 9 Yerger, 1.

²Shelburne Falls National Bank vs. Townsley, 102 Mass., 177; Bank of Louisiana vs. Tournillon, 9 La. Ann., 132.

³Bank U. S. vs. Carneal, 2 Peters, 543.

⁴Rand vs. Reynolds, 2 Grat., 171; Follain vs. Dupre, 11 Rob., (La.), 454.

⁵Beckwith vs. Smith, 22 Maine, 125.

⁶Walter vs. Haynes, Ryan & M., 149.

⁷Mann vs. Moors, Ryan & M., 249.

⁸Burmester vs. Barron, 17 Q. B., 828; see also Clarke vs. Sharpe, 3 M. & W., 166.

⁹Lewiston Falls Bank vs. Leonard, 43 Maine, 144.

¹⁰Hodges vs. Galt, 8 Pick., 251.

¹¹Stewart vs. Eden, 2 Caines, 121.

dressed to London where the bill was dated sufficed, although the residence of the acceptor was stated in the acceptance, and by inquiry of him it would have been ascertained that the drawer resided in Chelsea; and he never got the letter.¹ But in the United States a stricter rule has been generally applied; and if it is shown that the drawer did not reside at the place of date, and did not duly receive the notice, he will be discharged unless the holder proves that he had been unable to ascertain his place of residence after due diligence in inquiring had been used.² The same rule would *a fortiori* apply to the case of an indorser.

It has been said in some cases that the place of date is also *prima facie* evidence of the residence of the indorser of a bill or note;³ but this is straining the presumption too far.⁴ It is but slight, at best, even in the case of the drawer.⁵ But coupled with other circumstances the date of the bill might be evidence of the place of residence of the indorser. They should, however, be strong and persuasive.⁶

§ 47. If at the time the bill or note is drawn or indorsed the party resides at a certain place, the holder may presume that he resides

¹Burmester *vs.* Barron, 17 Q. B., 828; see also Clarke *vs.* Sharpe 3 M. & W. 166; Thomson on Bills, (Wilson's ed.,) 353.

²Lowery *vs.* Scott, 24 Wend., 358; Barnwell *vs.* Mitchell, 3 Conn., 101; Fisher *vs.* Evans, 5 Binney, 541; Foard *vs.* Johnson, 2 Ala., 565; Pierce *vs.* Strathers, 27 Penn. State, 249; Hill *vs.* Varrell, 3 Greenleaf, 233; Robinson *vs.* Hamilton, 4 Stew. & P., 91.

³Sasser *vs.* Whitely, 10 Maryland., 98; Moodie *vs.* Morrall, 3 Constitutional R., (S. C.,) 367. ⁴Branch Bank *vs.* Pierce, 3 Ala., 321.

⁵Lowery *vs.* Scott, 24, Wend., 358. In this case the bill was dated Michigan City, Indiana, but the drawer resided at Waterford, New York. Notice was sent to Michigan City, Indiana, and it not appearing that inquiry had been made to ascertain the drawer's residence it was held insufficient. Bronson, J., said:

"In the case of an *indorser* it clearly would not be sufficient to send notice to the place where the bill is dated, without showing something more. But it is said that will do in the case of a *drawer*. Although there may be a slight presumption that the drawer resides at the place where the bill purports to have been made, it can not be very strong, for it is matter of common experience that men draw bills when absent from home, on business or for pleasure, and date them at the place where they are drawn. As the plaintiffs are indorsees and not original parties to the bill, it is not to be presumed that they knew where the drawer resided. But I think they were bound to make some inquiry on the subject at the place where payment was demanded."

⁶In Wood *vs.* Corl, 4 Met., 203, the note was dated at Buffalo and the Notary testified that it was reported that the indorser lived there. Notice to indorser sent to Buffalo was held sufficient. In Page *vs.* Prentice, 5 B. Monroe, 7, the bill was dated at Louisville, and notice sent so directed to the indorser was held sufficient, it appearing that process had been served on him in the county in which Louisville is located.

there at its maturity, and send notice accordingly;¹ and the presumption of continued residence is all the stronger when the paper was discounted there at the time it was executed.²

EVIDENCE OF NOTICE.

§ 48. The burden of proving that notice was given in due time before action brought, is upon the plaintiff. He must show distinctly that it was given on the proper day; and it will be insufficient to show that it was given on one of two days, because the latter would have been too late.³

¹Knott vs. Venable, 42 Ala., 186.

²Ward vs. Perrin, 54 Barbour, 89.

³Lawsen vs. Sherwood, 1 Stark., 314, (2 E. C. L. R.) In Friend vs. Wilkinson & Hunt, 9 Grat., 31, two bills payable in Cincinnati were protested for non-payment, on 1st February, 1850, and notice was due to the Bank of Virginia, at Charleston, Kanawha county, Va., which had transmitted it for collection. Judge Allen, who rendered the opinion of the Court, said: "A notice of protest dated at Cincinnati on the 1st of February, 1850, was sent by mail to the Cashier of the Bank of Va., at Charleston, Ka. Cy., Va., and was received on the night of the 7th February, enclosed in a letter postmarked Cincinnati, Ohio, and was handed to Friend, the indorser, on the next day. It was further proved that a letter would arrive at Charleston in four or five days after it was mailed in Cincinnati, if it came by the direct route. If sent by another route, a letter might be ten or twelve days on the way; or that it might be, and letters sometimes were, delayed at Chillicothe, Ohio, by the regulations in regard to the departure of the mail on the regular route from Cincinnati. Upon this proof the question arises whether Friend had due notice of the dishonor of the bill. The Bank of Va., at Charleston, Kanawha, is to be treated as a distinct holder, the bill having been placed there for pre-emption, and collection; and notice was given by it in due time after it was received from Cincinnati. The party not residing in or near the city of Cincinnati, a notice sent by the mail of the next day, or the next practicable mail, would be sufficient. And the burden of proving a reasonable notice is on the plaintiff. It is, where notice is required, a condition precedent to his right to recover, and he must show a strict performance. In this case it does not appear whether there was a daily mail between Cincinnati and Charleston or not, nor when the notice was put in the post-office to be mailed. It is dated on the 1st and was received on the night of the 7th of February; and the proof is that a letter would arrive at Charleston in four or five days after it was mailed at Cincinnati if it came by the direct route. The notice therefore might have been placed in the office, and mailed on the morning of the 4th and have arrived after night on the 7th, according to this evidence. Being protested on the 1st, it should have been placed in the office to be sent by the mail of the next day, unless that was Sunday, and if so, by the mail of the third of February if there was such mail, or if not, by the next practicable mail; and it was incumbent on the plaintiff below to show the time it was so placed in the office to be mailed.* * The notice may have been put in the office to be mailed on the 2d, and not have been received until the night of the 7th; if so it would have been sufficient; but it might have been put in the office and mailed on the 3d or 4th and received at the same time; if so, it was too late, unless that was the first mail after the dishonor of the bill. And these were matters which the plaintiff was bound to prove, and probably could have done so by an examination of the Notary."

A post-mark is *prima facie*,¹ but not conclusive,² evidence that notice was mailed on the day designated; and when one puts a letter in the mail on the day that it ought to be received he must show that it was posted in time to be received on that day.³

§ 49. When there are a number of parties entitled to notice it is sufficient in order to hold any one of them bound, to show that notice reached him in such a time as it would occupy for the intermediate parties to transmit it to him in due course of the mails, allowing each one his day.⁴ But the courts can not take judicial cognizance of the course of the mails and that must be shown by the plaintiff.⁵ It would be better for him also to show that he gave notice in due season to his immediate indorser.⁶ When the plaintiff has shown that notice reached the remote party within the time which would regularly be consumed, it will be for him to show a defective link in the chain of notices, if any there be.

§ 50. When the mail is the proper channel for the communication of notice, it is not necessary to show the distinct fact that the particular letter containing the notice was put in the mail by ocular evidence thereof. Proof that notice was put with letters for the post-office by one clerk, and that the letters of that day were deposited by another clerk, would be sufficient.⁷ And it would likewise be sufficient to show that it was put with letters customarily made up in the usual course of business for the post-man; and that he invariably carried all the letters found upon the table.⁸ But it has been held that proof that a letter was put on the table with others, and that it was the regular course of business for the porter to take them to the post-office, would not be sufficient—at least unless it were proved that the porter *always* carried the letters so prepared, which, without any distinct remembrance as to that particular one, the Court intimated would be satisfactory.⁹

Delivering the notice to the assistant post-master in an adjoining

¹Early *vs.* Preston, 1 Patton & Heath, 228; Crawford *vs.* Branch Bank, 1 Ala., 205.

²Stocken *vs.* Collin, 7 M. & W., 515; 9 C. & P., 653, (38 E. C. L. R.)

³Fowler *vs.* Hendon, 4 Tyrw., 1002; Byles on Bills, (Sharswood's ed.,) 427.

⁴Jones *vs.* Wardell, 6 Watts & S.; Etting *vs.* Schuylkill Bank, 2 Penn. State R., 355
Marsh *vs.* Maxwell, 2 Camp., 210.

⁵Friend *vs.* Wilkinson, 9 Grat., 31; Carter *vs.* Burley, 9 N. H., 558; Early *vs.* Preston, 2 Pat. & Heath, 228. ⁶1 Parsons N. & B., 518.

⁷Commercial Bank *vs.* Strong, 4 Camp., 28 Vt., 316.

⁸Skilbeck *vs.* Garbet, 7 Q. B., 816. See Brailsford *vs.* Williams, 15 Md., 150; Flack *vs.* Green, 3 Gill & J., 474; Miller *vs.* Hackley, 5 Johns., 375.

⁹Hetherington *vs.* Kemp, 4 Camp., 193; Byles on Bills, (Sharswood's ed.) 420.

room would suffice, that being the usage of the place;¹ but a clerk's statement that notice was put in, he not remembering whether by himself or another, would not.²

§ 51. When the facts are ascertained, it is simply a question of law, for the Court to determine whether or not reasonable diligence has been exercised;³ but when the facts are disputed it is a question for the jury upon hypothetical instructions of the Court.

When due diligence has been exercised and notice sent accordingly, the holder is not obliged to give any further notice, although he afterwards discovers that the notice was sent to the wrong place. Such is the doctrine of the United States Supreme Court.⁴ In New York a contrary view has been taken, but without apparent confidence,⁵ and it would be more reasonable to regard the holder as having complied with his obligation when he had acted with due diligence to ascertain the indorser's whereabouts.

JOHN W. DANIEL.

Lynchburg, Virginia.

¹Mount Vernon Bank *vs.* Holden, 2 R. I., 467.

²Hawkes *vs.* Salter, 1 Moore & P., 750.

³Bank of Columbia *vs.* Lawrence, 1 Peters, 578; Harris *vs.* Robinson, 4 Howard, 336; Walker *vs.* Stetson, 14 Ohio State, 89, Belden *vs.* Lamb, 17 Conn., 442; Wheeler *vs.* Field, 6 Metc., 290; Bank of Utica *vs.* Bender, 21 Wend., 643.

⁴Lambert *vs.* Ghiselin, 9 Howard, 552.

⁵Beale *vs.* Parish, 20 N. Y., 407.

Consideration of Negotiable Instruments.

§ 1. By consideration, is meant a benefit or gain of some kind to the party making the promise, or a loss or injury of some kind to the party to whom it is made. By the common law a promise made without consideration was invalid, and in order to enforce any contract it was necessary to aver and prove a consideration.

The most ancient exception to this rule was made in reference to promises under seal, the solemn act of the party in attaching a seal to the evidence of his contract being regarded as importing a consideration and estopping him from denying it. The necessities of trade soon produced another relaxation of the rule; and by the usage and custom of merchants bills of exchange and promissory notes came to be regarded as *prima facie* evidences of consideration; and peculiar qualities were accorded to them which were possessed by no other securities for debt. These qualities, so far as they relate to the consideration of such instruments, we propose now to discuss.

§ 2. We have already stated that a bill or note, by its very character as such, imports to have been executed for a consideration sufficient in law; and, therefore, when suit is brought upon a bill or note the mere production of the paper carries with it an averment and *prima facie* proof of consideration. And it is unnecessary for the plaintiff to make any averment or produce farther proof of a consideration. This much may be said of any bill or note whether it possesses the negotiable quality or not—for even a non-negotiable bill or note imports a consideration, and so far as the immediate parties are concerned, a negotiable bill or note has no superiority over one not negotiable. In either case the defendant may show that there was in fact no consideration for the engagement into which he entered; and thus rebut the *prima facie* evidence which the instrument itself gives against him. It is only when the negotiable instrument has passed into the hands of a third party, that it becomes invested with those peculiar qualities which give it value. Then the *prima facie* evidence of consideration becomes conclusive; and while the transferee of the non-negotiable instrument still stands on no better footing than his transferrer, the transferee of a negotiable instrument (provided he himself acquires it before its maturity, for valuable con-

sideration, and in the usual course of business,) assumes a higher position. Against him the original payors are precluded from making the defenses which they might have made while the instrument lingered in the hands of the original payees; and the paper passes current from hand to hand in commercial transactions without occasion for inquiry to be made as to the original consideration.

But while a negotiable bill or note imports in itself a consideration, yet when evidence has been introduced to rebut the presumption which it raises, the burden is upon the plaintiff to satisfy the jury upon all the evidence, and by the preponderance of evidence that there was a consideration; and the mere production of the instrument does not shift upon the defendant the burden of proving that there was no consideration.¹

BETWEEN WHAT PARTIES THE CONSIDERATION IS OPEN TO INQUIRY.

§ 3. The same rule which admits inquiry into the consideration of negotiable paper between the original payor and payee extends to admit such inquiry in any suit between parties between whom there is a privity. That is to say, between the immediate parties to any contract evidenced by the drawing, accepting, making or indorsing a bill or note, it may be shown that there was no consideration, or that the consideration has failed, or a set-off may be pleaded; but as between other parties *remote* to each other, none of these defenses are admissible. It becomes important then to determine who are to be regarded as the immediate parties, or parties between whom there is a privity to a negotiable instrument, and who are remote. Amongst the former may be classed: 1, The drawer and acceptor of a bill, or the drawer and payee of a bill as a general rule; 2, The maker and payee of a note;² and, 3, The indorser and immediate indorsee of a bill or note.³

But the want of consideration; or the failure thereof, can not be pleaded in a suit brought: 1, By an indorser against the maker of a note; 2, By an indorser against a prior but not his immediate indorser; nor,⁴ 3, By the payee against the acceptor of a bill, as a gen-

¹Black River Savings Bank *vs.* Edwards, 10 Gray, 387.

²Puget de Bras *vs.* Forbes, 1 Espinasse, 117; Jeffries *vs.* Austin, 2 Stra., 674.

³Easton *vs.* Pratchett, 1 Crompt. M. & R., 798; 2 Crompt. M. & R., 542; Holliday *vs.* Atkinson, 5 B. C., 591; Abbott *vs.* Hendricks, 1 Man. & G., 791; Klein *vs.* Keyes, 17 Misso., 326; Barnet *vs.* Offerman, 7 Watts, 130; Clement *vs.* Reppard, 15 Penn. at 111.

⁴1 Parsons N. & B., 176.

eral rule.¹ They are regarded as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defence against the holder: 1, The consideration which the defendant received for his liability; and, 2, That which the plaintiff gave for his title.² And if any intermediate holder gave value for the instrument, that intervening consideration will sustain the plaintiff's title.³

Thus in Louisiana where Confederate notes have been held an illegal consideration, it has been decided that the purchaser for value of a negotiable note given for a loan of Confederate money, could recover against the maker notwithstanding the fact that he knew the character of the consideration, he himself having obtained it from a *bona fide* holder without notice.⁴

§ 4. Who are the immediate parties to a bill or note however does not always appear on its face. The name of the payee is often left blank, or there is an indorsement in blank upon the instrument, and in such cases when the blank is filled up with the holder's name he would appear to be the original payee or indorsee.⁵ In such cases the holder may show that his ostensible is not his real relation to the paper; and the want or failure of consideration can not be pleaded against him if he show that it has passed through intermediate hands and that he is not the immediate promisee of the party attempting the defense.⁶

Thus, if *Anderson* for a good consideration moving from *Brown* to

¹*Hoffman & Co. vs. Bank of Milwaukee*, 12 Wallace, 181. In this case a consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn, drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud, and the consignee not knowing of the forgery, paid the drafts, it was held that there was no recourse by the consignee against the bank. See the opinion of the Court, p. 190.

²*Hoffman & Co. vs. Bank of Milwaukee*, 12 Wallace, 181; *Craig vs. Sibbett*, 15 Penn., 240; *U. S. Bank of Metropolis*, 15 Peters, 393; *Swift vs. Tyson*, 16 Peters, 1; *Robinson vs. Reynolds*, 2 Q. B., 196, (42 E. C. L. R.); *Thiedemann vs. Goldsmith*, 1 DeGex F. & J., 4; *Hunter vs. Wilson*, 19 L. J. Exch., 8; 4 Exch., 489, S. O.

³*Bytes on Bills*, (Sharwood's ed.) 236; 1 *Persons N. & B*, 192; *Hunter vs. Wilson*, 4 Exch., 489; *Boyd vs. McCann*, 10 Md., 118; *Howell vs. Crane*, 12 La. An., 126; *Watson vs. Flanagan*, 14 Texas, 354; *Roscoe on Bills*, 111; *Kyd on Bills*, 277; *Story on Bills*, §188; *Johnson on Bills*, 80; see chapter on rights of *bonafide* holder or purchaser. ⁴*Cotten vs. Sterling*, 20 La. An., 282.

⁵*Brummel vs. Enders*, 18 Grat., 873; *Hoffman vs. Bank of Milwaukee*, 12 Wallace, 193.

⁶*Munroe vs. Berdier*, 8 C. B., 862; *Arbonin vs. Anderson*, 1 Q. B., 498; *Glasscock vs. Rand*, 14 Misso., 550; *Horn vs. Fuller*, 6 N. H., 511.

him should procure *Charles* to make his note in favor of *Brown*, it would seem that it would be no answer in an action by *Brown* against *Charles* that the latter received no consideration from *Anderson*.¹ But if it were shown that there was no consideration between *Anderson* the creditor, and *Charles* the maker, or that such consideration had failed; it would then be necessary for the payee *Brown*, to show a consideration moving from him to *Anderson*.²

And if the consideration between the party requesting the execution of the note, and the maker, were illegal, the note would not be valid, notwithstanding the consideration between such party and the payee were good,—if the payee knew the consideration moving the maker were illegal. To hold otherwise would furnish an easy subterfuge to escape the consequences of illegal dealings. Thus, where *A.* was indebted to *B.* for intoxicating liquors sold in violation of law, and *B.* was indebted to *C.* for a legal consideration, and *A.* at *B.*'s request executed a note with mortgage to *C.*, who knew the illegality of the debt to *B.*, it was held that such note and mortgage were invalid.³

So if *A.* for a good consideration moving from *B.* to him, authorizes him to draw a bill on *C.* to a certain amount on his (*A.*'s) account, and *B.* draws accordingly and *C.* accepts, *C.* will be absolutely bound to *B.*, the drawer, as to any subsequent *bona fide* holder for value.⁴

¹*Ibid.*

²*Aldrich vs. Stockwell*, 9 Allen, 45. The defendant offered to show that the note was for a water wheel sold by Thompson to him with warranty, which had failed, the wheel being worthless; and had been made payable to plaintiff at Thompson's request. The Court below ruled that these facts constituted no defense, but the Supreme Court held otherwise; and Gray, J., said: "If such were the facts the defendant was entitled to treat the sale as a nullity; and the proof of entire failure of consideration would have rebutted the presumption of consideration arising from the admission of the making of the note, and would have established a complete defense as between the original parties to the note. One consideration of the note having been proved there could be no presumption, in the absence of evidence, that there was any other; and the defendant was not therefore obliged to prove that there was no other consideration for the note. If there was any other consideration, it was for the plaintiff to show it. As the case stood the plaintiff might have held the note in trust, or as agent for Thompson. The presiding judge, by ruling that the facts offered to be proved by the defendant would constitute no defense, left nothing upon which he could go to the jury. The verdict to which he submitted under this ruling must therefore be set aside. Upon a new trial, it will be open to the plaintiff to show, if he can, that the consideration which failed was not the only consideration for the note; but there was another valuable consideration for it moving from the plaintiff to Thompson."

³*Baker vs. Collins*, 9 Allen, 253.

⁴*Pillans vs. Van Mierop*, 3 Burr, 1663; 1 Parsons N. & B., 183.

But the consideration of the acceptance failing, we should think the consideration for the authority from A. to B. would have to be proven.¹

But if the original consideration were tainted with fraud or illegality, or has failed in whole or in part, and the bill or note has passed into the hands of a *bona fide* holder for value without notice, yet if it be returned for a valuable consideration to the payee who is a privy to the original consideration, he could stand upon no better footing than if the instrument had remained in his hands.²

§ 5. That the bill or note has been lost or stolen,³ or was executed under duress;⁴ or under fraudulent misrepresentations,⁵ or for fraudulent consideration,⁶ or for illegal consideration,⁷ or has been fraudulently obtained from an intermediate holder,⁸ or been in any way the subject of fraud or felony,⁹ is a good defense as between the parties privy to it. And the same defense which the defendant might make, to an action by an indorsee of the note given by him—and the same requirement of proof, may be made by him in an action on a renewal of a former note, both notes being regarded as given upon the same consideration.

CONSIDERATION OF BILLS PURCHASED FOR REMISSION OF MONEY.

§ 6. The writers upon foreign bills contemplate four parties to the transaction. 1, The giver of value or purchaser of the bill, which is drawn for remittance—such purchaser desiring the draft for money on a foreign place, being called the Remitter. 2, The drawer of the bill. 3, The drawer abroad, and 4, The payee. The ordinary course of dealing with reference to such foreign bills begins by the sale of the bill by the drawer to some person other than the payee; and it does not contemplate, therefore, that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the¹⁰ payee. In such case there would be no privity be-

¹Aldrich vs. Stockwell, 9 Allen, 45.

²Sawyer vs. Wisevell, 9 Allen, 42.

³Mills vs. Barber, *supra*.

⁴Clark vs. Peace, 41 N. H.

⁵Vatlin vs. Lane, 6 Grat., 246; Hutchinson vs. Bogg, 28 Penn. St., 294.

⁶Morton vs. Rogers, 12 Wend., 484. See rights of *bona fide* holder.

⁷Edmunds vs. Groves, 2 M. & W., 642; Bingham vs. Stanley, 2 Q. B., 117; Holden vs. Cosgrove, 12 Gray, 216.

⁸1 Parsons N. & B., 188.

⁹Holden vs. Cosgrove, 12 Gray, 216; Western Bank vs. Mills, 7 Cush., 546.

¹⁰Munroe vs. Bordier, 8 C. B., 862, (65 E. C. & L. R.) In this case it was held: (See 1 Parsons, N. & B., note X., page 181 to middle of 11th line same note, and page 182.) In Kyd on Bills it is said the parties to Bills of Exchange are generally four, two at the place where the bill is drawn, and two at the place of payment; as where A., a

tween the drawer and payee, and the former could not plead against the latter for the want or failure of consideration.

If the bill be delivered by the drawer to the remitter upon a promise to pay the price next day and the remitter without paying, transmit the bill to the payee, the drawer might plead no consideration to the suit of the latter provided the remitter were his agent.¹ But if the remitter purchase the bill on credit for himself, and sell it in good faith to the payee, the drawer could not resist the payee's suit for want of consideration, if the remitter failed to pay the purchase money.² Thus, if Duncan, Sherman & Co., of New York, being indebted to Gilliott & Sons, of London, procures Fish & Hatch, New York, to draw a bill on London in favor of Gilliott & Sons, and remit it to the latter in payment of the debt, the liability of Fish & Hatch to Gilliott & Sons, will be absolute, whether any consideration for the drawing of the bill has been paid by Duncan, Sherman & Co., or not. But if Duncan, Sherman & Co., were agents of Gilliott & Sons in purchasing the bill, there would then be a privity between Gilliott & Sons, and Fish & Hatch, and want of consideration could be pleaded.

PROOF OF CONSIDERATION WHEN BILL OR NOTE IS IN HANDS OF THIRD PARTIES.

§ 7. When the bill or note has passed into the hands of a third party, we have already seen that the defendant, if he be not the im-

merchant at Amsterdam, owes money to B., a merchant in London, instead of sending the money in specie to B., he applies to C., another merchant at Amsterdam, to whom D., a fourth person residing in London, is indebted to an equal amount. A. pays to C. the money in question, and receives from him a bill directed to D. to pay the amount to B., or to any one appointed by him, who sends it to his correspondent B., with an order that the money be paid to him by D.—Kyd on Bills, 3.

¹*Puget de Bras vs. Forbes*, 1 Esp., 117. The plaintiff resided in Holland and having money in England employed Agassiz, Rengement & Co., as his agents to sell it out, and to remit it to him in bills on Holland. The agents bought of the defendants bills on Holland in favor of the Plaintiff; and it was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post-day. The bills were bought on February 17th and the next post-day was Tuesday, February 21st. On Monday the 20th Agassiz, Rengement & Co. stopped payment, so that the defendants, in fact, never received any value for the bills which they had so drawn on Holland in favor of the plaintiff; and they having ordered their correspondent abroad not to pay the bills, an action was brought against them by the plaintiffs, as drawers. It was held that they were not bound.

²*Munroe vs. Bordier*, 8 C. B., 872, (65 E. C. L. R.); 2 Rob. Prac., (New ed.), 145.

mediate indorser of the indorsee has a double burden imposed upon him. He must show in such cases not only the want or failure of the original consideration, but he must go farther and show want or failure of the consideration between the plaintiff and his immediate indorser. It is important to observe, however, that the rules of evidence conform themselves in some respects, to suit the circumstances under which the parties are presumed to be placed; and there are two leading principles which are well settled.

The *first* is that proof of a total want of consideration, as that the bill or note was executed for accommodation, or was intended as a gift, or was given for a balance erroneously supposed to be due, will not shift upon the plaintiff that he acquired it upon a sufficient consideration,¹ and subsequent failure of consideration stands on the same footing.² Respecting accommodation bills, it was said by the Court of Exchequer, Lord Abinger delivering the opinion:³ "If a man comes into Court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says I lent my name to the drawer for the purpose of his raising money upon the bill, the probability is that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of a fraud be raised from it's being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away or has been lost or stolen, in which case the holder must show that he gave value for it: The *onus probandi* is cast upon the defendant."

§ 8. But if the defendant show that there was fraud or illegality in the origin of the bill or note, a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted to suffer; but as the knowledge of the manner in which it came into his hands must rest in his bosom and the means of showing it must be much easier to him than to the de-

¹See chapter on Rights of a *bona fide* holder. This rule was first laid down by Parke J., in *Heath v. Sansom*, 2 B. & Ad., 291, dissenting from the opinion of the Court; but it is now well settled in England as well as in the United States.—*Whitaker v. Edmunds*, 1 Moody & R., 366; *Mills v. Barker*, 1 M. & W., 425; *Percival v. Trampton*, 2 Crompt. M. & R., 180; *Ellicott v. Martin*, 6 Md., 509; *Ross v. Bedell* 5 Duer., 462.

²*Wilson v. Lazier*, 11 Grat., 477; *Knight v. Pugh*, 4 Watts & S., 445.

³*Mills v. Barber*, 1 M. & W., 425.

defendant, he is required to give proof that he became possessed of it for a sufficient consideration.¹

If he is innocent, the burden must generally be a light one; and if guilty it is but a proper shield to one who would be but for its protection, his victim.

§ 9. It was formerly considered necessary in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove consideration;² but it is well settled now that no such notice is necessary, and it is seldom given.³ It was, also, formerly held that where the consideration given by the plaintiff was disputed and a notice to that effect had been given, the plaintiff must go into his whole case in the first instance, and could not reserve proof of consideration as an answer to the defendant.⁴ But now the plaintiff is only required to give affirmative proof of consideration after the defendant has given evidence tending to rebut the *prima facie* case which the production of the instrument makes out.

WHAT ARE SUFFICIENT CONSIDERATIONS.

§ 10. When it has been determined that the relations of the parties are such as to admit an inquiry into the consideration, it becomes then, important to ascertain what is such a consideration as will support an action upon a negotiable instrument. A valuable consideration is necessary to support any contract, and the rule makes no exceptions as to the character of the consideration respecting negotiable instruments, when the consideration is open to inquiry. Therefore a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note; as for instance, when a bill or note is accepted or made by a parent in favor of a child or *vice versa*, it could not be enforced between the original parties, the

¹Vathin vs. Lane, 3 Grat., 246. In Harvey vs. Towers, 6 Exch., 656, Pollock, C. B., said: "It is now well settled that if a bill be founded in illegality or fraud, or has been the subject of felony or fraud, upon that being proved, the holder is compelled to show that he gave value for it." Smith vs. Braine, 16 Q. B., 244, overruling Brown vs. Phillpot, 2 Moody & R., 285; Bailey vs. Bidwell, 13 M. & W., 73.

²Paterson vs. Hardacre, 4 Taunt., 111; Byles on Bills, (Sharswood's ed.,) 321, note A.

³Mann vs. Lent, 1 M. & M., 240, 10 B. & C., 877, (21 E. C. L. R.;) Bailey vs. Bidwell, 13 M. & W., 75.

⁴Delauney vs. Mitchell, 1 Stark., 439, (2 E. C. L. R.)

engagement being gratuitous upon what is called a *good*, in contradistinction to a valuable consideration.¹

And if a note is executed and delivered with the intention of presenting it as a gift, and is afterwards taken up, and a new note given in its stead the renewed note is without valuable consideration.² And of course a note given by a parent to his child during his life-time could not be enforced after his death against his estate.³

§ 11. A gift of a negotiable instrument of a third party is not such a negotiation of it in the usual course of business, as to give the donee the full protection which is extended a *bona fide* holder for value. And if the donee afterwards transfer it for less than its value, or for a wholly inadequate consideration, his indorsee can recover from a prior party having a defense against the donor only what he himself paid for it.⁴ But as to all prior parties having no defense against the donor the donee can himself recover the whole amount,⁵ and *a fortiori*, an indorsee who has paid only a partial consideration may recover the whole amount against all prior parties who have no defense against his immediate indorser.⁶

A MERE MORAL OBLIGATION NOT SUFFICIENT.

§ 12. A mere moral obligation although coupled with an express promise, will not constitute a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time—or where there is a precedent consideration, that an express promise will create or revive a cause of action.

Thus, a promissory note made after full age for necessities furnish-

¹Parker vs. Carter, 4 Munf., 273; Hill vs. Buckminster, 5 Pick., 391; overruling Bowers vs. Hard, 10 Mass., 427; Fink vs. Cox, 18 Johns., 145; Pearson vs. Pearson 7 Johns., 26; Pennington vs. Gittings, 2 Gill. & J., 208; Smith vs. Kittridge, 21 Vt. 238; Holliday vs. Atkinson, 5 B. & C., 501; Easton vs. Prachett, 1 Crompt. M. & R. 798; 2 Crompt. M. & R., 542; Story on Bills, (Bennett's ed.,) 181; 1 Parsons N. & B., 178; Chitty on Bills, (13th Am. ed.,) 89.

²Copp vs. Sawyer, 6 N. H., 336; Hill vs. Buckminster, 5 Pick., 391.

³Phelps vs. Phelps, 28 Barbour, 121.

⁴Byles on Bills, (Sharswood's ed.,) 227; Nash vs. Brown, Chitty on Bills, (13 Am. ed.,) 89; Brown vs. Matt, 7 Johns., 361; Holeman vs. Hobson, 8 Humph., 127 Bethune vs. McCrary, 8 Georgia, 114; Chicopee Bank vs. Chapin, 8 Met., 40; Youngs vs. Lee, 18 Barbour, 187.

⁵Milnes vs. Dawson, 5 Exch., 948.

⁶Moore vs. Candell, 11 Misso., 614; Turner vs. Brown, 3 Smedes & M., 425; Farbell vs. Sturtevant, 28 Vt., 513; Reid vs. Furnival, 5 C. & P. 499.

ed to the promiser during infancy;¹ or a note executed for the payment of a debt discharged in bankruptcy, or barred by the statute of limitations;² or voluntarily released,³ or for the reimbursement of a person who has voluntarily paid a debt of the promiser,⁴ would be valid, as upon any other valuable consideration. And in any case where the contract was merely voidable, but otherwise founded on a valuable consideration, a bill or note given to discharge it will be valid—but otherwise if the contract were void.⁵

But it has been held in England by the Court of Exchequer, that a bill given since the repeal of the usury laws to pay a debt with usurious interest, contracted during the existence of the usury laws, was binding.⁶ And a note given by the purchaser of an estate to the vendor for the purchase money, is made on sufficient consideration though the contract be void by the statute of frauds.⁷ The indorsement of a note of a bankrupt by the payee gives it no effect as to the bankrupt; and it has been held that a new promise by the bankrupt after his discharge in bankruptcy, and after the indorsement, does not revive his liability;⁸ but it has been held in Massachusetts that a promise by the maker of a note after his discharge in bankruptcy to pay it is a contract to pay it according to its tenor,⁹ and we can not see that there is any just reason to the contrary. If the bankrupt could bind himself by a renewal, why insist on that form of obligation when the same result is attainable by his recognition of his old one. It is in effect, a renewal of its vitality without the circumvention of respecting the execution.

§ 13. Not only will money paid, or advances made, or credit given or work and labor done, constitute a sufficient consideration for a bill or note—but receiving a bill or note as security for a debt or forbearance to sue upon a present claim or debt, or becoming a surety, or

¹Hawkes *vs.* Saunders, Cowp. R., 239; Eastwood *vs.* Kenyon, 11 Ad. & El., 438, (39 E. C. L. R.); Chitty on Bills, (13 Am. ed.,) 87.

²Eastwood *vs.* Kenyon, 11 Ad. & El., 438, (39 E. C. L. R.); Trueman *vs.* Fenton, Cowp., 544.

³Stafford *vs.* Bacon, 25 Wend., 384; Valentine *vs.* Foster, 1 Metcalf, 520; Snevily *vs.* Read, 9 Watts, 396.

⁴Hayes *vs.* Warren, 2 Str., 933; Stokes *vs.* Lewis, 1 Term. R., 20.

⁵Eastwood *vs.* Kenyon, 11 Ad. & El., 438; (39 E. C. L. R.); Littlefield *vs.* Shree, 2 Barn & Adol., 811.

⁶Flight *vs.* Reed, 22 L. J. Exch., 265; 1 H. & C., 708, (S. C.)

⁷Jones *vs.* Jones, 6 M. & W., 84.

⁸Walbridge *vs.* Harron, 18 Vt., 448; White *vs.* Wardwell, 31 Maine, 558.

⁹Way *vs.* Serry, 6 Cushing, 238.

doing any other act at the request of the drawer, indorser, or acceptor, will be equally sufficient to enforce his engagement.¹ Bankers receiving the bills or notes of their customers for collection are considered holders for sufficient consideration not only to the extent of advances already made by them either specifically or upon account, but also for future responsibilities incurred upon the faith of them.² The balances upon an account are a shifting consideration for bills and notes deposited as security with the banker.³ Thus, where one bank which we may call A. sent an accommodation bill accepted by C., to another bank which we may call B., to secure an indebtedness upon account; and when the bill became due the latter bank had become indebted to the former, but the bill was not withdrawn, and subsequently the indebtedness shifted back, and the original debtor, bank A., became bankrupt owing the correspondent B., a sum upon account, it was held that the latter could recover against C. upon the accommodation bill accepted by him.⁴

PRE-EXISTING DEBT.

§ 14. There is no doubt that a pre-existing debt of the drawer, maker or acceptor, is a valid consideration for his drawing or accepting a bill or executing a note, and indeed is as frequently the consideration of negotiable paper as a debt contracted at the time.⁵ And it is equally as valid and sufficient consideration for the indorsement and transfer to the creditor of the bill or note of a third party which is in his hands. And the best considered as well as the most numerous authorities, regard the creditor who receives the bill or note of a third party from his debtor either in payment of,⁶ or as collateral security for, his debt, as entitled to the full protection of a *bona fide* holder for value, free from all equities which might have been pleaded between the original parties.

¹Bayley on Bills, ch. 12; Chitney on Bills, (13 Am. ed.,) 86; Roscoe on Bills, 386. A promise by A. to indemnify B. for becoming guarantor for C. is not within the statute of frauds, and need not be in writing. Chapin vs. Merritt, 4 Wend., 657.

²Byles on Bills, (Sharswood's ed.,) 230; Bosanquet vs. Dudman, 1 Stark, 1; Percival vs. Frampton, 2 Cremp., M. & R., 180.

³Bank of Metropolis vs. New England Bank, 1 Howard, 239, S. C.; 17 Peters, 174; Swift vs. Tyson, 16 Peters, 21. ⁴Attwood vs. Crowdie, 1 Stark, 483, (2 E. C. L. R.)

⁵Swift vs. Tyson, 16 Peters, 1; Townsley vs. Sumrall, 2 Peters, 170.

⁶See chapter on rights of a *bona fide* holder; Byles, 231, 232; Swift vs. Tyson, 16 Peters 1; Bank of St. Albans vs. Gilliland, 23 Wend., 31; Bank of Sandusky vs. Scofield, 24 Wend., 115; Youngs vs. Lee, 18 Barb., 187; Bertrand vs. Barkman, 8 English, 150; Henry vs. Ritenour, 31 Ind., 136.

DEBT OF THIRD PERSON.

§ 15. There is no doubt that a debt due from a third person—as from A. to B.,—is a good consideration for a note, as from D. to B., provided there were an express agreement for delay,¹ or an implied agreement which would arise if the debt were then due, and the note were made payable at a future day.² If the original debt from the third person were payable simultaneously with the note, there might be a want of consideration unless credit for the original debt had been given upon a promise of the note which would be sufficient.³

As a general rule the discharge of a debt of a third person will be a valid consideration for a bill or note;⁴ but in Massachusetts it has been held that a promissory note given by a widow to a creditor of her deceased husband is void for want of consideration, if the husband has left no estate or assets; and although the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note, the circumstances being such that no good could be derived by the widow, or injury done the creditor by the transaction.⁵ And in Maryland, a note, given by a vestryman of a church to pay a debt of the church, was without consideration and void; and the fact that it was payable at a future day raised no presumption of forbearance to sue, it appearing that it was made for the purpose of closing an account.⁶

So any other thing done at his request by the promisee for a third person, will in general, be a sufficient consideration—such as forbearing to sue on a debt due by such person, or guaranteeing his debt, or becoming liable for his acts, or defaults.⁷

¹Mansfield *vs.* Corbin, 2 Cush., 151.

²1 Parsons N. & B., 195; Balfour *vs.* Sea, Fire, & Life Ins. Co., 3 C. B., (N. S.), 300 (91 E. C. L. R.)

³Crofts *vs.* Beale, 11 C. B., 172; (73 E. C. L. R.); 1 Parsons N. & B., 195.

⁴Brainard *vs.* Capella, 31 Miss., 428; Arnold *vs.* Sprague, 34 Vt., 402; Thatcher *vs.* Dinsmore, 5 Mass., 299; Byles on Bills, (Sharswood's ed.,) 233; Poplewell *vs.* Wilson, 1 Stra., 264.

⁵Williams *vs.* Nichols, 10 Gray, 83; Dewey, J., saying: "The widow would derive no benefit from the discharge of a debt due by her deceased husband. Nor do we perceive how any possible damage to such creditor could arise from having given a receipt to the widow purporting to discharge such demand." It is said in England that it is a sufficient consideration for a note that it be given by a widow out of respect to the memory of her husband: Chitty on Bills, (13 Am. ed.,) §2. No such decision would we think be now rendered.

⁶Rogers *vs.* Waters, 2 Gill & J., 84.

⁷Story on Bills, §183.

CROSS NOTES AND ACCEPTANCES AND OTHER INSTANCES.

§ 16. If one give his acceptance to another that will be a good consideration for another bill or acceptance, although such first acceptance be unpaid.¹ And cross acceptances, or cross notes, or bills for the mutual accommodation of the parties, are respectively considerations for each other.² And a contract between two accommodation indorsers that they will share any loss equally between them, is upon sufficient consideration.³

Delay in fulfilling a promise to marry and services rendered during the engagement, constitute a good consideration for a note;⁴ and in Scotland it has been held that a bill granted to a woman as a security for a promised marriage is valid, and may be enforced against the man if he break his promise.⁵

Professional services whether of a physician, attorney, or other person, in the learned or skilled professions, constitute in general, a sufficient consideration for a bill or note; and consideration that the plaintiff, an attorney, should prevent the approval of the Commanding General to the sentence of a military court condemning a guerilla to death, is valid.⁶ Services rendered in procuring a pardon for an offense have also been respected;⁷ though it has been said by some of the authorities that this would contravene public policy unless done by leave of the court.⁸ This is, we think, too severe. Services exerted in procuring the passage of an act through a legislative body are not recognized as the legitimate exercise of the legal profession; and compensation for them can not be recovered.⁹ If contingent upon the passage of a bill, it would be obvious that they were illegitimate.¹⁰

¹Rose vs. Sims, 1 B. & Ad., 521, (20 E. C. L. R.)

²Whittier vs. Eager, 1 Allen, 449; Shannon vs. Langhorne, 9 La. An., 526; Eaton vs. Carey, 10 Pick., 211; Bacon vs. Holloway, 2 E. D. Smith, 159; Dowe vs. Schutt, 2 Denio, 621. ³Phillips vs. Preston, 2 Howard, 278.

⁴Prescott vs. Ward, 10 Allen, 203.

⁵Thomson on Bills, (Wilson's ed.,) 72; citing Calder vs. Provan, (Scotch case.) In Lew vs. Peers, 4 Burr., 2225, judgment was arrested on a bond which defendant had agreed to pay plaintiff if he married any one else but her. This case is clearly distinguishable from the principle of the text of Thomson, though he seems to think it in conflict. ⁶Thompson vs. Wharton, 7 Bush., (Ky.,) 563.

⁷Meadow vs. Bird, 22 Georgia, 246.

⁸Chitry on Bills, (13th Am. ed.,) 100; Thomson on Bills, (Wilson's ed.,) 70; citing Stewart vs. Earl of Galloway, (Scotch case); Norman vs. Cole, 3 Esp., 253.

⁹Marshall vs. Balt. & O. R. R. Co., 16 Howard, 334.

¹⁰Mill vs. Mills, 40 N. Y., 543.

ACCOMMODATION BILLS AND NOTES.

§ 17. The mercantile credit of parties is frequently loaned to others by the signature of their names as drawer, acceptor, maker, or indorser of a bill or note, used to raise money upon, or otherwise for their benefit. Such instruments are termed accommodation paper. An accommodation bill or note, then, is one to which the accommodating party has put his name without consideration for the purpose of accommodating some other party who is to use it and is expected to pay it.¹ Between the accommodating and accommodated parties the consideration may be shown to be wanting, but when the instrument has passed into the hands of a third party for value, and in the usual course of business, it can not be;² for as between remote parties, as we have already seen, the consideration which the plaintiff gave for his title, as well as that for which the defendant contracted the liability, must be impeached in order to defeat a recovery.³ And the circumstance that the accommodation maker was assured that the payee would protest it being known to the holder, does not weaken in any degree his title to recover.⁴

§ 18. An accommodation bill or note is not considered a real security, but a mere blank, until it has been negotiated, and it then becomes binding upon all the parties, in like manner and to the like effect as if they were successive indorsers;⁵ but until it has been negotiated any party may withdraw his indorsement, acceptance, or other liability upon it and rescind his engagement; and that right is not impaired by the circumstance that he may be indemnified by an assignment or other security.⁶

FRAUD.

§ 19. "Fraud cuts down everything," is the phrase of the Lord Chief Baron in an English case.⁷ And between immediate parties it at once destroys the validity of a bill or note into the consideration of which it enters. We have seen that if a horse or other personal

¹Byles on Bills, (Sharwood's ed.,) p. 237; *Fant vs. Miller*, 17 *Grat.*, 47; *Robertson vs. Williams*, 5 *Munf.*, 531.

²*Violett vs. Patton*, 5 *Cranch*, S. C., 142; *Yeaton vs. Bank of Alexandria*, *Id.*, 49; *French vs. Bank of Columbia*, 4 *Cranch*, S. C., 59; *Fant vs. Miller*, 17 *Grat.*, 47; *Robertson vs. Williams*, 5 *Munf.*, 331.

³*Ante* §.

⁴*Thatcher vs. West River National Bank*, 19 *Mich.*, 196.

⁵*Whitworth vs. Adams*, 5 *Rand.*, 342; *Taylor vs. Bruce*, *Gilmer*, 42; *May vs. Boisseau*, 8 *Leigh*, 164; *Downes vs. Richardson*, 5 *Barn. & Ald.*, 674.

⁶*May vs. Boisseau*, 8 *Leigh*, 164.

⁷*Rogers vs. Hadley*, 32 *L. J. Exch.*, 248.

chattel is warranted, and a bill, note, or check, given for the price, the breach of the warranty is no defense to the action on the bill, note, or check (unless authorized by statute);¹ but if it appear that the seller knew that there was unsoundness in the horse, or other chattel, the element of fraud enters into the transaction. There was in fact, no contract, and proof of the fraud at once defeats the action on the bill, note, or check.² While inadequacy of consideration in the origin, or transfer of a negotiable instrument, is not in itself, a defense to a suit upon; yet it is oftentimes a circumstance strongly tending to show a fraud in the contract in which it was given, or transferred. Evidence therefore in a suit on a note for certain pictures is not admissible for the purpose of reducing the damages by proving that they were of inferior value; but it would be good to show that they were fraudulently palmed off on the defendant.³

If the defendant repudiate the contract on the ground of fraud he must return the consideration—otherwise the plaintiff may recover on the bill or note.⁴

FRAUD ON THIRD PERSONS VITIATES CONSIDERATION.

§ 20. Fraud upon third persons vitiates a bill or note given in furtherance of it as between the parties; and the most frequent instance in which fraud of this kind appears is in undue advantage claimed by one or more creditors when the debtor enters into a composition in which all appear to stand on the same footing. If the creditor refuses to enter into the agreement of composition until he receives a note for the residue of his debt, such note will be fraudulent and void;⁵ and the fraud extends to the composition notes given to such creditor, and vitiates them also.⁶ If the note for the residue be given by a third person who is indemnified by the debtor, it will be void.⁷ In these cases the creditor and insolvent are "*participes criminis*," but not "*in pari delicto*." It can never be *par delictum* when one holds the rod and the other bows to it.⁸ So if a third person pay money for the debtor, in fraud of the composition, the debtor's note to such person for the amount is void.⁹

¹See Post infra.

²Lewis vs. Cosgrove, 2 Taunt., 2.

³Solomon vs. Turner, 1 Stark., 51, (2 E. C. L. R.) See, also, Rudderow vs. Huntington, 3 Sandford, 252, where goods were sold by an auctioneer with warranty or misrepresentation, and turned out to be spurious. Held, no defense, it not appearing that the auctioneer knew the fact.

⁴Archer vs. Bamford, 2 Stark., 175.

⁵Cockshott vs. Bennett, 2 T. R., 763; Knight vs. Hunt, 5 Bing., 432, (15 E. C. L. R.)

Rice vs. Maxwell, 13 S. & M., 289.

⁶Dougherty vs. Savage, 28 Conn., 248.

⁷Bryant vs. Christie, 1 Stark., 329.

⁸Smith vs. Cuff, 6 M. & S., 160.

⁹Bryant vs. Christie, 1 Stark., 329.

BILLS AND NOTES EXECUTED UNDER DURESS.

§ 21. Any contract entered into under duress lacks the first essential of validity, the consent of the contractor, and bills and notes form no exception to the rule. As between immediate parties, proof of duress at once annuls the instrument; but whether or not in the hands of a *bona fide* holder for value without notice the duress in its inception utterly avoids it, is a question upon which the authorities do not altogether agree. It has been held in England that where it appeared that the defendant gave the bill while under duress abroad, and under a threat of personal violence and confiscation of property, and without consideration, that it was incumbent on the plaintiff to give some evidence of consideration,¹ and all the authorities go so far as to require evidence of consideration. But the party who signs a bill or note under such threats and dangers of personal violence as would naturally impel a man of reasonable firmness and courage, is certainly not a free agent, and in no wise in default; and we can but think that the better doctrine is that held in Scotland, where force used to obtain the subscription of a bill or note, nullifies the subscription, since the subscribers consent is wanting. The party is not bound by such a subscription, more than if it had been forged, in which case the obligation being originally null, even an indorsee can acquire no right to enforce it.² The principle there is not extended to all cases where the party consented under such circumstances as to raise a good objection against the original payee; for instance, where the bill or note was obtained by fraud, or by a mixture of deception and terror, though without such a degree of violence as would influence a man of ordinary constancy. Thus, where a party whose cattle had broken into another's field, was intimidated by the threat of a law suit to give him a bill for an unreasonable amount of damages, it was held that the bill must be reduced in so far as the damages were exorbitant.³ But it does not appear that the grounds of reduction in this case could have been pleaded against an indorsee, suing on the bill or note, for there was a real consent, and consequently an obligation which, till reduced, was transmissible to a third party.

The English doctrine is cited by many text-writers on bills and notes without criticism or dissent, and as a correct statement of

¹Duncan vs. Scott, 1 Campb., 100.

²Thompson on Bills, (Wilson's ed.) 62.

³Thompson on Bills, (Wilson's ed.) 62.

the law;¹ but at least one English author seems to agree with us,² as does also the most recent and thorough of the American writers on bills and notes.³

A threat to arrest the defendant in an action of slander is a threat to make an unlawful arrest; and a contract procured by means of such a threat, if sufficient to overcome a person of ordinary firmness, may be avoided.⁴

ILLEGAL CONSIDERATIONS BY THE COMMON LAW.

§ 21. A bill or note which is founded upon an illegal consideration is void; for the law will not aid one who seeks or has consented to its violation. Sometimes the consideration is illegal, because opposed to the general principles of the common law; and sometimes because it is specially interdicted by statute. The considerations which are illegal at common law are: 1, Such as violate the rules of religion, moral or public decency; and, 2, Such as contravene public policy.

A bond given in consideration of future illicit cohabitation would be void; but not so if given for past cohabitation;⁵ but a bill or note as between immediate parties would not be enforced if given for past cohabitation, because not founded upon a consideration.⁶

A wager upon the sex of a person,⁷ or that an unmarried female would bear a child⁸ would be illegal, because violating decency.

¹Byles on Bills (Sharswood's ed.) 220; Bayley on Bills, ch. xi., p. 318; Chitty on Bills, (13th Am. ed.) 85; Edward's on Bills, 325; Story on Notes, §188; Story on Bills, §185.

²In Roscoe's Digest of Bills and Notes, note 20, p. 117, it is said, in commenting on *Duncan vs. Scott*, 1 Camp., 100: "It may be doubted whether the defendant in this case was liable even to a *bona fide* indorsee for value. The bill being drawn under duress, no contract arose, and it resembles the case of a bill drawn by a *feme covert* who is under a disability to contract."

³Prof. Parsons says, in vol. I N. & B., 276: "A note or bill obtained by duress might not be available in any hands against the party so compelled; and if the note were a good note, and a subsequent party indorsed it by duress, he would not be bound to any one; but a subsequent indorsee who indorsed it over for value, would be bound to his own indorsee, or those deriving title from him." But in a previous portion of his work he follows in the rut of the authorities already quoted in a previous note; 1 Parsons N. & B. 188. ⁴*Frost vs. Hildreth*, 10 Allen, 76.

⁵*Beaumont vs. Reeve*, 8 Q. B., 483; *Friend vs. Harrison*, 2 C. & P., 584.

⁶1 Parsons N. & B., 214; Byles, (Sharswood's ed.,) 246.

⁷*Da Costa vs. Jones*, Cowp., 729. ⁸*Ditchburn vs. Goldsmith*, 4 Camp., 152.

CONSIDERATIONS WHICH OPPOSE PUBLIC POLICY.

§ 22. Considerations which oppose public policy are never respected by the law; and contracts founded upon them are universally condemned. Contracts in general restraint of trade;¹ or restraining or preventing marriage even for a time;² or to assist another in furthering a marriage where the promiser has no right to interfere;³ to procure or sell a public office⁴ or votes; to suppress evidence or interfere with the course of justice by dropping a criminal prosecution;⁵ and contracts to indemnify a person in doing an act of known illegality, as inducement thereto;⁶ or to do anything reprehensible for its injurious effects upon the feelings of third persons; or in fraud of the rights and interests of third persons,⁷ are instances of the kind of contracts which the law will not recognize.

Of the like kind are contracts founded on consideration to resign a public office;⁸ to induce the withdrawal of a bid for a Government contract,⁹ to withdraw the papers in defense in a divorce suit;¹⁰ to get possession of goods wrongfully held;¹¹ for the sale of libellous or immoral works;¹² or for the supply of drinks to influence votes for a public office.¹³

Abandonment of the prosecution of an offense against the public of which the law requires prosecution is, as we have seen, not a good consideration. It is a high requirement of public policy that felonies should be investigated and punished, and compounding a felony, as such a compromise is called, is frowned upon by the courts, and is never permitted to be enforced. It is not necessary to stamp the transaction with illegality that a felony should have been committed. It is sufficient if it be *charged*, for the investigation of the charge is the policy of law, which is sought to be protected.¹⁴

¹Chitty on Bills, (13 Am. ed.,) 99.

²Hartley vs. Rice, 10 East., 22; Lowe vs. Peers, 4 Burr, 2225;

³Roberts vs. Roberts, 3 P. Wms., 66; 1 Parsons on Contracts, 555, 556.

⁴Richardson vs. Mellish, 2 Bing., 229, (9 E. C. L. R.); Martin vs. Wade, 37 Cal., 168.

⁵Edgecombe vs. Rodd, 5 East., 294; Fallows vs. Taylor, 7 T. R., 475; Porter vs. Havers, 37 Barbour, 343; Gardner vs. Maxey, 9 B. Monroe, 90; Commonwealth vs. Johnson, 3 Cush., 454; Soule vs. Bonney, 37 Maine, 128; Clark vs. Ricker, 14 N. H., 44; Hinesburgh vs. Sumner, 9 Vt., 23.

⁶Chitty on Bills, (13 Am. ed.,) 102; Edwards on Bills, 340; Goodale vs. Holdridge, 2 Johns., 193. ⁷*Ibid.*

⁸Meachum vs. Dow, 32 Vt., 721.

⁹Kennedy vs. Murdick, 5 Harrington, 458.

¹⁰Stontenburg vs. Lybrand, 13 Ohio, (N. S.) 228. ¹¹White vs. Heylman, 10 Casey, 142.

¹²Fores vs. Johns, 4 Esp., 97, Turk vs. Richmond, 13 Barb., 533.

¹³Jackson vs. Walker, 5 Hill, 27, S. C.; 7 Hill, 387.

¹⁴Chandler vs. Johnson, 39 Georgia, 85.

But compounding a private misdemeanor, such as a suit for slander, or other civil action, is a good consideration for a note;¹ and a good bill substituted for a forged one without any agreement to stifle the prosecution, is valid.² So is a note given to the prosecutor after the trial and conviction for expenses of the prosecution.³

Forbearance to prosecute a claim, or the compromise of a doubtful one, is a good consideration for a note or bill;⁴ but the compromise of one *clearly illegal* is not.⁵ So, resignation of an office in a corporation is a good consideration;⁶ and all contracts in partial restraint of trade on fair and beneficial terms, are supported.⁷

BY WHAT LAWS CONSIDERATION DETERMINED.

§ 23. The legality of the consideration of a contract is to be determined by the laws of the state or country where the contract is made, and not by those of the state or country where the suit is brought. The rules of every nation from comity admit that the laws of every other nation in force within its own limits ought to have the same force everywhere, so far as they do not prejudice the rights of other governments or their citizens.⁸ The rule is founded not merely on the convenience, but on the necessity of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse or commerce with each other.⁹

These principles have been applied by the courts of the United States since the close of the war against the Confederate States to instruments executed during the war for the loan of Confederate States Treasury notes, or which were payable in that medium: it having been the only currency in general circulation within the Confederate lines; and also to those executed in payment of hires or purchase money of slaves, after slavery had been abolished.

The United States Supreme Court has held unanimously that a

¹Wallrige vs. Arnold, 21 Conn., 424; Clark vs. Reker, 14 N. H., 44; Drage vs. Ibber-son, 2 Esp., 643; Gardner vs. Maxey, 9 B. Monroe, 90.

²Wallace vs. Hardacre, 1 Camp., 45.

³Kirk vs. Strickwood, 4 B. & Ad., 421, (24 E. C. L. R.)

⁴Muirhead vs. Kirkpatrick, 21 Penn. St., 237; Stewart vs. Ahrenfeldt, 4 Denio, 189; Phelps vs. Younger, 4 Indiana, 450; Austell vs. Rice, 6 Georgia, 472; Stephens vs. Spiers, 25 Missouri, 386.

⁵Sullivan vs. Collins, 18 Iowa, 228. ⁶Peck vs. Regua, 13 Gray, 407.

⁷Bunn vs. Grey, 4 East., 190; Jenkins vs. Temples, 39 Georgia, 655, when the contract was not to trade in the same place.

⁸Story's Conf. Laws, § 242.

⁹Osborn vs. Nicholson, 13 Wallace, 656

promissory note payable in Confederate State Treasury notes made between parties within the lines of the Confederate States during the war was not executed upon an illegal consideration, unless it was executed with the intent to aid the Confederate cause;¹ and the courts of many of the reconstructed Southern States and of other States have adopted similar views.² Confederate currency having been the only medium of exchange in the Confederate lines for the better part of the war, any other view would seem peculiarly rigorous and cruel; but it has nevertheless prevailed in some of the State tribunals.³

In the State tribunals of the Southern States where this question has been of much consequence, conflicting views have been taken, but many of the cases concur in judgment with the Supreme Court of the United States.⁴ And in other States of the Union both before and since the war, the principles of these decisions have been asserted.⁵

NOTES FOR SLAVES.

§ 24. In respect to promissory notes given for slaves before Pres-

¹Thoringtop *vs.* Smith, 8 Wallace, 11; Chief Justice Chase after speaking of the actual supremacy of the Confederate Government in the seceded States, says: "It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency can not be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society; and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We can not doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation."

²Rivers *vs.* Moss, 6 Bush., (Ky.) 600; Rodes *vs.* Patillo, 5 Bush., (Ky.) 271.

³Note for loan of Confederate State Treasury notes void: Lawson *vs.* Miller, 44 Ala., 616; Calfee *vs.* Burgess, 3 W. Va., 274; Prigcon *vs.* Smith, 31 Texas, 171; Reavis *vs.* Blackshear, 30 Texas, 753. Contracts solvable in Confederate money held void, Beossat *vs.* Sullivan, 21 La. An., 565.

⁴McElvain *vs.* Mudd, 44 Ala., 48; Thompson *vs.* Warren, 5 Cold., 614; Contra. Laprice *vs.* Bowman, 20 La. Ann., 234; Lytle *vs.* Wheeler, 21 *Id.*, 193.

⁵Roundtree *vs.* Baker, 53 Illinois, 241, in which case it was held that an obligation for the purchase of a slave in Kentucky when slavery was legal might be sued upon in Illinois, and the subsequent abolition of slavery did not affect the note.

ident Lincoln's Emancipation Proclamation was issued, the Supreme Court of the United States has set the question of their validity at rest. It has been decided by that tribunal that a note dated March 26th 1861, and given for a slave could be recovered upon, notwithstanding that slavery was abolished on the 1st of January 1862, and the contract of sale contained the warranty, "the said negro to be a slave for life."¹ And also notwithstanding the Thirteenth Amendment to the Constitution made in 1865 by which it is ordained that "neither slavery nor involuntary servitude shall exist in the United States nor in any place subject to their jurisdiction."

A recovery upon instruments executed for slaves, or for Confederate money has been sought to be prevented by articles in the new constitutions of some of the states denying jurisdiction to the courts to enforce them; or in some such language declaring that they shall be deemed void. But such declarations whether of a state constitution or of a legislative enactment, evidently violate the provision of the National Constitution prohibiting the passage of any law impairing the obligation of a contract. The United States Supreme Court has so held,² and the decision is obviously just; but some of the Southern tribunals have held otherwise.³

In some of the States it has been held that notes for slaves sold *after* Lincoln's Emancipation Proclamation were as valid as those for slaves sold before,⁴ and according to the principles of the text which the authorities amply sustain, there can be substantially no difference in the cases, the Confederate Government being in power and protecting slavery within its lines as a legal institution.

EFFECT OF KNOWLEDGE OF ILLEGAL USE OF ARTICLE SOLD.

§ 25. It is stated as a general principle, by some of the text writers, that if goods be sold by a trader with *mere knowledge* that the purchaser intends an illegal use of them, but without lending any aid to

¹Osborn vs. Nicholson, 13 Wallace, 655. In Fitzpatrick vs. Hearne, 44 Ala., 171, it was held that a warranty on the sale of slaves "that the title of said slaves was warranted for the life of said negro slaves," was not broken by the subsequent emancipation of the slaves.

²White vs. Hart, 13 Wallace, 646; McElvain vs. Mudd, 44 Ala., 48.

³Graham vs. Maquire, 39 Georgia, 531; Green vs. Clark, 21 La. Ann., 567; Lawson vs. Miller, 44 Ala., 616.

⁴McElvain vs. Mudd, 44 Ala., 48; Hall vs. Keene, 31 Texas, 504.

his unlawful purpose, he may sustain an action on the contract;¹ and a number of cases would seem to support such a declaration.

But the proposition is certainly of limited application, and the courts are careful not to extend it. If the articles be sold with distinct knowledge that they are to be used for any illegal purpose, it is doubtful if the courts should allow a recovery of the purchase money; for public morality and good government must condemn the furnishing of means to violate the law; and when the use contemplated involves a heinous crime, as when one sells arsenic with knowledge that the purchaser intends to poison his wife with it,² or sells noxious drugs knowing that the brewer who buys them intends to use them in his manufacture,³ it is clear that the recovery should not be allowed. And it has been held both in England and in this country, that money lent to a man to enable him to settle his losses on an illegal stock-jobbing transaction, can not be recovered back.⁴ "No man ought to furnish another with the means of transgressing the law, knowing that he intended that use of them."⁵

Following the principle of the text, (but applying it to a case which the author by no means intends to approve,) the United States Supreme Court has held that a due bill for goods sold to be used by the Confederate States in prosecuting the war against the United States was void as upon an illegal consideration, and that an action could not be maintained by the seller or by any holder of the bill who was cognizant of the purpose for which the goods were purchased.⁶ And in Massachusetts it has been held that there can be no recovery upon a note by the plaintiff against a defendant who executed it to him for liquors, the defendant well knowing that they were to be resold in

¹Byles on Bills, (Sharswood's ed.), 247; 1 Parsons, N. B., 215; Gardner vs. Maxey, 9 B. Mon., 90; Clark vs. Recker, 14 N. H., 44 McGavock vs. Puryear, 6 Cold., 34; Coppock vs. Bower, 4 M. & W., 361.

²Lightfoot vs. Tenant, 1 Bos. & Pul., 551.

³Langton vs. Hughes, 1 Maule & Sel., 593.

⁴Cannan vs. Bryce, 3 Barn & Ald., 179, Abbott, C. J., saying: "If it be unlawful in one man to pay, how can it be lawful for another man to furnish him the means of payment." ⁵De Groot vs. Van Dazer, 20 Wend., 390.

⁶Hanauer vs. Doane, 12 Wallace, Bradley, J.: "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality he can not do it without turpitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. * * * There are cases to the contrary; but

violation of law and co-operating to that end.¹ And in Arkansas where the payee sold guns to be used in the war against the United States he was not permitted to recover.²

Money lent for the purpose of being used in gaming can not be recovered back by the lender; and a bill or note given for such purpose is as between the parties void.³ It is fully settled that the repayment of money lent for the express purpose of accomplishing an illegal object can not be enforced.⁴ But knowledge that the money was to be so used must be distinctly proved; and the mere fact that the borrower was a gambler, and that any one might expect him to game with the money would not suffice, of course, to show it.⁵

CONSIDERATIONS ILLEGAL BY STATUTE.

§ 26. The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect.⁶ There is, however, one exception to this rule; that when a statute expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it;⁷ though even upon such instruments an indorser may, as we shall presently see, be held liable.⁸

they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum* or of inferior criminality; or cases in which the unlawful act was already committed, and the loan was an independent contract made not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it."

¹Hubbell vs. Flint, 13 Gray, 277.

²Tatum vs. Kelley, 25 Ark., 209.

³M'Kinnell vs. Robinson, 3 M. & W., 434; Cutler vs. Welsh, 43 N. H., 497; Mordecai vs. Dawkins, 9 Rich., 262.

⁴M'Kinnell vs. Robinson, 3 M. & W., 434.

⁵1 Parsons, N. & B., 214.

⁶Thomson on Bills, (Wilson's ed.), 68.

⁷See also chapter on *bona fide* holder.

⁸Bayley vs. Taber, 5 Mass., 286; Vallett vs. Parker, 6 Wend., 615; Savage, C. J., said: "Wherever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the Court to be so, for failure of or the illegality of the consideration they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

There are very few cases in which the statute renders such instruments absolutely void; and the most important, if not the only instances now to be met with are the statutes against usury and gaming.¹

In England the policy of declaring the instrument a nullity in the hands of a *bona fide* holder no longer prevails, the statute of 8 & 9 Victoria, ch. 109, having relaxed the ancient rule on the subject;² and in some of the states similar statutes have been enacted.³ But the change has not become general, and in the States where contracts founded on gaming or usurious considerations are declared void bills and notes given to secure them are held void in the hands of every holder.

§ 27. When the statute merely declares expressly or by implication that the considerations shall be deemed illegal, the bill or note founded upon such consideration will be valid in the hands of a *bona fide* holder without notice;⁴ but the burden of proof will be upon the plaintiff when the illegal consideration appears, to show that he is a *bona fide* holder without notice.⁵ And if the statute in terms only forbids suit to be brought upon bills and notes founded on certain considerations, "except by a *bona fide* holder who has received the same upon a valuable and fair consideration, without notice or knowledge, &c.," they will be good in the hand of such a holder, but the burden of proof will be devolved upon him in like manner if it appear that the instrument originated in such a consideration.⁶ But want or failure of consideration do not require such proof of the holder."⁷

Where a statute provided that wherever in an action brought on a contract for the payment of money, it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, &c.; it was held to apply to the innocent indorsee of a note who received it in due course of trade.⁸

¹3 Kent Com., Sect., 44; Story on Bills, (Bennett's ed.), 189.

²See *Parsons vs. Alexander*, 5 El. & Bl., 263, (S. C., 30 Eng. L. & Eq., 299)

³*Vallatt vs. Parker*, 6 Wend.; *Kendall vs. Roberston*, 12 Cush., 156.

⁴*Paton vs. Coit*, 5 Mich., 505; *Sistermans vs. Field*, 10 Gray; *Wyat vs. Bulmer*, 2 Esp., 538. See chapter on Rights of a *bona fide* holder or Purchaser. ⁵*Ibid.*

⁶*Paton vs. Coit*, 5 Mich., 505; *Johnson vs. Meeker*, 1 Wis., 436; *Doe vs. Burnham*, 11 Foster, 426; Story on Bills, § 193.

⁷*Rosa vs. Bedell*, 5 Duer., 462; *Wilson vs. Lazier*, 11 Grat., 478.

⁸*Kendall vs. Robertson*, 12 Cush., 156. Shaw, C. J., said: "The former law extended the entire forfeiture to any holder of the note though an innocent indorsee;

Where a statute declared that all payments made for spirituous liquors sold contrary to law "should be held and considered to have been received in violation of law, without consideration, and against law, equity, and good conscience," it was held that a bill given for liquors so sold was valid in the hands of a *bona fide* holder without notice.¹ A bill accepted to secure payment of money taken in at an unlicensed theatre is void in the hands of all knowing the consideration for which it was given.²

If the paper be susceptible of a legal and an illegal construction, the courts will enforce it according to the most favorable construction *ut res magis valeat quam pereat*. Thus, where a due bill was made payable in Confederate bonds, or Tennessee money, the first named medium was deemed illegal, but payment in Tennessee money was enforced.³

The statement of consideration in a bill or note may be explained or contradicted in any case in which the consideration may be disputed between the parties; and it may be shown either that the consideration was different from that stated or that there was none at all.⁴

SUIT AGAINST INDORSER OF PAPER VOID BY STATUTE.

§ 28. While as we have seen a bill or note pronounced to be void by statute can not be enforced against the acceptor, or maker, even by a *bona fide* holder without notice, an indorser may nevertheless be liable upon his indorsement to his immediate indorsee and those holding under him.⁵ The indorsement is in the nature of the drawing of a new bill, and is an assurance of the validity of the instrument; and the indorser is not permitted to repudiate his own act if done

the natural conclusion is in the absence of express words changing the operation of the law, that it was the intention of the legislature to extend such partial forfeiture in like manner, and attach it as before to the note although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same, to suppress a mode of lending regarded as dangerous and injurious to society by attainting the contract, and attaching the penal consequences to the contract itself, whenever set up as proof of a debt."

¹Cazet vs. Field. Gray.

²DeBignis vs. Armistead, 10 Bing., 107, (25 E. C. L. R.)

³Hanauer vs. Gray, 25 Ark., 350.

⁴Abbott vs. Hendricks, 1 Man. & G., 791; Foster vs. Jolly, 1 Crump., M. & R., 703; Smith vs. Brooks, 18 Georgia, 440; Litchfield vs. Falconer, 2 Ala., 280; Matlock vs. Livingstone, 9 Shermes & M., 489; Barker vs. Prentiss, 6 Mass., 430.

⁵Chitty on Bills, (13th Am. ed.,) 98, 111, 116; Roscoe on Bills, 123; Bayley on Bills, chap. 12, p. 369; Byles, (Sharswood's ed.,) 250; Johnson on Bills, 32; Thomson on Bills, 82; 1 Parsons N. & B., 218; Edwards on Bills, 289, 350; Story on Notes, §193; Story on Bills, §190.

upon a legal consideration. Thus, in an action against the drawer of a bill it was held no defense that it was drawn and accepted for a gaming debt, it having been indorsed over by the drawer for a valuable consideration to a third person by whom the suit was brought;¹ and so the indorsee of a note given on such a consideration may sue the indorser.² And in an action against the maker and four indorsers of a note, it was held that the holder could recover against the fourth indorser of whom he was the indorsee for value, although it was indorsed for accommodation of the maker by the first three indorsers, and had been purchased by the fourth at a usurious rate of interest.³

Upon these principles it has been decided in Georgia, where the Supreme Court has held valid the article of the State Constitution which provides that "no court of this State shall try, or give judgment, or enforce any debt the consideration of which was a slave," that the courts should enforce payment by *the indorser* of a note given for a slave.⁴

In such cases the indorsee may recover of his indorser on a count for money had and received.⁵

¹Edwards vs. Dick, 4 Barn. & Ald., 212, (6 E. C. L. R.)

²Unger vs. Boas, 1 Harris, 60.

³Moffett vs. Bickle, 21 Grat., 283; Moncure, P., saying: "If there were any doubt upon this question, I think it would be removed by the case referred to by the learned counsel of the plaintiff in error of Edwards vs. Dick, decided by the court of King's Bench in 1822, and reported in 4 Barn. & Ald., 212, 6 Eng. C. L. R., 405. Abbott, C. J., and Bayley, Holroyde and Best, J. J., composed the court, and were unanimous. Such a decision of such a court is entitled to our highest respect. But the reasons assigned by the learned judges command more of our respect in weighing its authority, than does their high judicial character. * * * That, it is true, was a case in which the question arose as to the statute of gaming; while here the question arises in regard to the statute of usury. But the statute of gaming is very broad and sweeping in its terms, just as much so as the statute of usury. And, indeed, Abbott, C. J., in his opinion, places the case upon the same ground as that of usury, and says: "there is no case upon the statute of usury where a drawer having parted with a bill for a good consideration can afterwards set up as a defense an antecedent usurious contract between himself and the acceptor. For, if so, a court of justice would enable him to commit a gross fraud upon an innocent party."

⁴Graham vs. McGuire, 39 Georgia, 531. Brown, C. J., saying: "The payee of a promissory note given for a slave, who, for a valuable consideration, which was in no way connected with the slave, indorsed and delivered the note to the plaintiff, is liable. The indorsement is a new contract, and the court has jurisdiction to enforce the judgment against him on that contract."

⁵Ingalls vs. Lee, 9 Barbour, 947; Edwards on Bills, 289.

PARTIAL WANT OF CONSIDERATION.

§ 29. Whenever the defendant is entitled to go into the question of consideration he may set up the partial as well as the total want of consideration.¹ Thus, where the drawer of a bill for £19 5s., payable to his own order, sued the acceptor, and it appeared that the bill was accepted for value as to £10, and as an accommodation to the plaintiff as to the residue, it was held, that although with respect to third persons the amount of the bill might be £19 5s., yet as between these parties it was an acceptance to the amount of £10 only.² So where a note was given by A. to B., for the sum of £32 6s. 10d upon B.'s representation and assurance that that amount was due, whereas A. owed B. £10 14s. 11d., and no more, the note was held good only for the amount that was actually due.³ So, where a father gives his son a note partly for services, and partly as a gratuity, the partial want of consideration might be pleaded as to such portion of the amount as was gratuitous; and it would be no objection that no distinct amount was fixed upon as compensation for the services, but it would be for the jury to settle what amount was founded on the one consideration, and what on the other.⁴

It is said in a recent edition of Story on Bills,⁵ as it is said in a number of English cases,⁶ that a partial failure of consideration is no defense; but it is conceived that the distinction already taken is the correct one, and the cases in which the contrary dictum occurs are those in which the sum was unascertainable by mere computation, and was matter of unliquidated damages.⁷

§ 30. Where an article sold is received upon delivery but does not answer the description given of its quality or value, the party who has given his bill or note in payment, can not make the breach of warranty a defense in England—and in many of the States;⁸ but

¹Thomson on Bills, (Wilson's ed.) 64; Byles on Bills, (Sharswood's ed.) 239.

²Darnell vs. Williams, 2 Stark., 166, (3 E. C. L. R.); Barber vs. Backhouse, Peake, 61; Clarke vs. Lazarus, 2 M. & G., 167.

³Forman vs. Wright, 11 C. B., 481, the words of the plea, "fraudulently and deceitfully," were rejected as surplusage. ⁴Parish vs. Stone, 14 Pick., 198.

⁵Story on Bills, (Bennett's ed.) 184.

⁶Morgan vs. Richardson, 1 Camp., 40; Obbard vs. Betham, Moody & M., 483; Tye vs. Gwynne, 2 Camp., 346.

⁷Chitty on Bills, (13th Am. ed.) 91; Roscoe on Bills, 105; Bayley on Bills, 344; 1 Parsons N. & B., 207; Day vs. Nix, 9 J. B. Moore, 159; Edwards on Bills, 335; Story on Notes, §187. In an early case Lord Kenyon left it to the jury to consider what damages had been suffered by the defendant in a suit on a note, in the transaction in which it was given; but the case has not been followed as a precedent. Ledger vs. Ewer, Peake, 216. ⁸See Code of Virginia.

in some of the States he must resort to his cross action for damages for breach of contract;¹ unless indeed the article be of no value, in which case the consideration will be regarded as having entirely failed.² There should be an offer in such a case to return the property and rescind the contract,³ according to some cases; but according to others this is unnecessary.⁴

If the article be of any value at all, although entirely speculative, the contract will be enforced.⁵

TOTAL AND PARTIAL FAILURE OF CONSIDERATION.

§ 31. The total failure of consideration is as good a defense to a suit upon a bill or note, as the original want of it; and is confined to the like parties. If the contract is rescinded the consideration of the bill or note totally fails, and payment of it can not be enforced.⁶ Thus, if the vendee give his bill or note for goods of a certain manufacture, growth, or description, and the payee fails to deliver goods of the character contracted for, the former may rescind the contract, and refuse to pay his bill or note, there being a total failure of consideration.⁷ So, where a purchaser of a patent gave his note for it, and the patent proved void, it was held that the consideration had totally failed.⁸

And a partial failure of the consideration is a good defense *pro tanto*.⁹ But such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part, can be availed of by way of defense; and if it be an unliquidated claim the defendant must resort to his cross action.¹⁰ Thus, where bills have been accepted in consideration of the payee giving the acceptor the lease of a house, and he let him into possession but gave no lease, it was held no defense to an action on the bill, but that there was merely a counter-claim for damages.¹¹ So where the bill was given for work to be done, and the work when done was bungled

¹Warwick vs. Nairn, 10 Exch., 762; Elminger vs. Drew, 4 McLean, 388.

²Shepherd vs. Temple, 3 N. H., 455.

³Thornton vs. Wynn, 12 Wheat., 183.

⁴Shepherd vs. Temple, 3 N. H., 455.

⁵Johnson vs. Titus, 2 Hill, 606.

⁶Thomson on Bills, (Wilson's ed.,) 66.

⁷Wells vs. Hopkins, 6 M. & W., 7.

⁸Dickinson vs. Hall, 14 Pick., 217.

⁹Story on Bills, §184; Story on Notes, §187; Drew vs. Towle, 7 Foster, 412; 1 Parsons N. & B., 207; Thomson on Bills, (Wilson's ed.,) 64.

¹⁰Pulalfer vs. Hotchkiss, 12 Conn., 234; Elminger vs. Drew, 4 McLean, 388; Drew vs. Towle, 7 Foster, 412; Stone vs. Peake, 16 Vt., 213; Ferguson vs. Oliver, 8 Smedes & M., 332; Kernodle vs. Hunt, 4 Black, p. 57.

¹¹Moggridge vs. Jones, 14 East., 485; 3 Camp., 38.

in part, and not worth the amount of the bill.¹ If the consideration is illegal in part, the bill or note is void *in toto*.

§ 32. When the defense is founded on illegality of consideration it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity—that a partial illegality vitiates the bill or note “*in toto*,” while the partial want or failure of consideration only vitiates it *pro tanto*.² And a mortgage to secure a bill or note of which the consideration is in part illegal, is also wholly void.³ The reason of the distinction is based mainly upon the ground of public policy, the courts not undertaking to unravel a web of fraud for the benefit of the party who has woven it.⁴ If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent, though not upon the bill or note.⁵

§ 33. There are some cases in which the line of demarcation between the fraud which does not affect the *bona fide* holder for value without notice, and that which utterly vitiates the instrument in any hands, is narrow and difficult to distinguish; but in those in which some natural infirmity has been imposed upon, or some deception practiced without the fault or neglect of the party who is sought to be made its victim, it is held that he is not liable.

The *first class* of cases comprise those in which the party sought to be charged upon the negotiable instrument has been betrayed by his agent, or some other party to whom he has intrusted his signature on a blank paper, and who has fraudulently written over it a bill or note. There is no doubt that if the bill or note were complete with the exception that there was a blank left for the sum, the parties who had signed, accepted, or indorsed it, would be bound to pay any sum with which it might be filled up to a *bona fide* holder without notice of the limitation of authority to the agent or other person having it in hand,⁶ and it is immaterial that such holder knew that it had been

¹Trickey vs. Larne, 6 M. & W., 278. See 1 Parsons N. & B., p.

²Scott vs. Gillmore, 3 Taunt., 226; Robinson vs. Bland, 2 Burr., 1077; Hay vs. Ayling, 3 Eng. Law & Eq., 416; Hanauer vs. Doane, 12 Wallace, 342; Carlton vs. Bailey, 7 Foster, 230; Brigham vs. Potter, 14 Gray, 522; Deering vs. Chapman, 22 Maine, 488; Woodruff vs. Heniman, 11 Vt., 592; Clark vs. Ricker, 14 N. H., 197; Hyslop vs. Clarke, 14 Johns., 465; Chandler vs. Johnson, 39 Ga., 85.

³Brigham vs. Potter, 14 Gray, 522.

⁴Byles on Bills, (Sharswood's ed.,) 256.

⁵Robinson vs. Bland, 2 Burr, 1077; Utica Ins. Co. vs. Kip, 8 Cowen, 20.

⁶Michigan Bank vs. Eldred, 9 Wallace; Russel vs. Langstaffe, 2 Dougl., 514; Violett vs. Patton, 5 Cranch; Orrick vs. Colston. In Fullerton vs. Sturgis, 4 Ohio State, A. and B., as sureties of C., signed an instrument payable to D. or order, in blank as to

signed, accepted, or indorsed, in blank, unless he was also cognizant of its being fraudulently filled up.¹

It seems also to be well settled that if the party sought to be charged has intrusted his blank signature to an agent, or other person, and has authorized such agent or other person to fill the blank in some form, for some purpose, that he would be bound to a *bona fide* holder if the agent or person wrote over such signature, a bill or note. Thus, where papers indorsed in blank were left with a clerk with authority to use them for certain purposes, and they were fraudulently obtained from him and used differently, the indorser was held liable.²

These cases proceed upon the doctrine that when one of two innocent persons must suffer, the loss must fall upon him who has put it in the power of another to do the injury; as also upon the rule of the law of agency which makes the principal liable for the acts of his agent in violation of private instructions, when he has held the agent out as possessing more enlarged authority.³

§ 34. The *second class* of cases comprise those in which the signature of the party has been written on a blank paper, and no authority has been given to the persons in whose hands it is intrusted to write any contract over it; as, for instance, if such signature were written on the fly-leaf of a book loaned to such person, or in an album, or were left him for any legitimate purpose, such as to be used as a means of identifying the writer's hand-writing; and in such cases, if a bill or note be written over the blank signature, the party would not be bound.⁴ This principle is based upon the ground that the party has been in no default, and has done nothing improper whereby he should be made responsible for the crime and fraud of another. Thus, where A. wrote his name on a piece of blank paper, and sent it to B., his agent, in order that he might use it in identifying his signature; and B. had a note printed over it, and passed it to C. before maturity, in the usual course of business, it was held that the latter could not recover.⁵ And so when the party wrote his name

date, amount, and time of payment, and delivered it to C., the principal, with the agreement that it should not be filled up for more than \$1,000 or \$1,500. C. filled it up for \$10,000 and discounted it; and it was held that the parties were bound.

¹Huntingdon vs. Branch Bank, 3 Ala., 186.

²Putnam vs. Sullivan, 4 Mass., 45. See Parsons N. & B., p.

³Fullerton vs. Sturgis, 4 Ohio State, 529.

⁴Caulkins vs. Whisler, 29 Iowa, 495; Nance vs. Lary, 5 Ala., 370.

⁵Caulkins vs. Whisler, 29 Iowa, 495, in which case Beck, J., said: "The case differs materially in its facts from the case cited in support of plaintiff's right to recover.

on a blank paper, and it was taken from his table by another, who caused a note to be written over it, the like decision was rendered.¹

§ 35. The *third class* of cases are those in which some natural infirmity, or defect of education has been imposed upon, and the party deceived into signing a note under the impression that it was for a different amount, or was a contract of a different character. Thus, if a note were fraudulently or falsely read to a blind man, and he were to sign it believing it to have been correctly read,² or if the party were unable to read, and signed a note under the assurance that it was an agreement of a different kind;³ we should have a new element entering into the consideration of his liability. In such cases the want of faculties to detect the fraud shields the party from its consequences; and the authorities justly exonerate him on the ground that he is guilty of no laches.

§ 36. The *fourth class* of cases are those in which the party possesses the ordinary faculties and knowledge, and is betrayed into signing a bill or note by the assurance that it is an instrument of a different kind. It is agreed that if the party is guilty of any negligence in signing the paper he is bound;⁴ and the act itself, it seems to us, can hardly be committed without negligence. A man has no right to

In these cases blanks were filled up contrary to the direction of the maker or without his authority. But in all of such cases the makers intended to execute an instrument which should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention of the makers; but in all such cases there were *makes* and *instruments*, and through the frauds of those to whom the instruments were intrusted, they were thus made to be of different effect than was designed by the makers. In these cases it is correctly held, that while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments as against holders in good faith, and for value.

The reason is obvious. The maker ought rather to suffer, on account of the fraudulent act of one to whom he intrusts his paper, or who is made agent in respect to it,

¹Nance vs. Lary, 5 Ala., 370. ²Putnam vs. Sullivan, 4 Mass., 45, Parsons, C. J.

³Whitney vs. Sharp, 2 Lansing, 477.

⁴Douglas vs. Matting, 29 Iowa, 498, Beck, J., said: "The defendant trusted the one with whom he was dealing with the preparation of the instrument. The instrument as prepared, was not what defendant had agreed to sign, but was voluntarily executed by him. The act of the agent was a fraud whereby the defendant was induced to make the note, and not the false making of it, which is necessary to constitute a forgery. * * * * *

Now it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger he signed the instrument without reading it or attempting to ascertain its true contents. The law will favor as between the holder and maker in such a case, the

have eyes and see not; or ears and hear not; and while the law should protect those who suffer with the want of the senses in their proper development, it should not permit those who have them to throw the burden of their failure to use them upon innocent third parties. In such cases we should say the act of signing the paper without intending to do so, imported negligence *per se* and rendered the party liable. In accordance with this doctrine, it was held in Iowa that where one Matting was induced to sign a promissory note under the false representation that it was a contract of agency, he was bound to a *bona fide* holder.

And where a party's signature was fraudulently obtained to a printed form or blank under pretence of getting an order for a machine, and the payee filled it up as a negotiable note for \$75, payable to T. H., or bearer, the like decision was rendered.¹

From the case of *Foster vs. McKimmon*, 4 C. B., 704, it would seem that in England a different view is taken. In that case the party was induced to indorse a bill upon the assurance that it was a guaranty, and it was held that he was not bound. It appears from the evidence, however, that he was a gentleman far advanced in life, and that circumstance may have been of some weight in relieving him from the imputation of negligence. We certainly can not concur in the opinion of the court that the intention of the party signing the

than an innocent party. The law esteems him in fault in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon this negligence. In the case under consideration no fault can be imputed to defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant can not be regarded as being so far in fault in the transaction, that he ought to bear the loss resulting from the crime."

more innocent and diligent. The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of this act are about to be visited upon him, he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence. He can certainly claim protection neither on the ground of his innocence or diligence.

The rule contended for by appellee would tend to destroy all confidence in commercial paper. It is better that defendant, and others who so carelessly affix their names to paper, the contents of which are unknown to them, should suffer from the fraud which their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

¹*McDonald vs. Muscatine National Bank*, 27 Iowa, 319.

paper should have any influence in fixing his responsibility. Third parties can have no opportunity to scrutinize his intention which is a sealed book to all but himself; and he should not be permitted to escape the responsibility of what *he did*, by pleading what he designed *to do*.

WHERE BILL OR NOTE FRAUDULENTLY OR FELONIOUSLY OBTAINED FROM DRAWER OR MAKER.

§ 37. We have seen that delivery is necessary in the case of a bill or note, as it is in the case of every other contract, in order to consummate its validity between the parties to it. Suppose, however, that a bill, or promissory note, or bank note, has been fully completed in form and signed by the drawer or maker, and before delivery is stolen from the possession of the party who has signed it, and passed by the thief to a *bona fide* holder for value in the usual course of business, would the fact that the party signing had never delivered it afford him a defense against such *bona fide* holder? whether the instrument be payable to bearer, or to the order of the thief, if it be indorsed by him, we can see no reason why the *bona fide* holder should not be entitled to recover. The want of delivery is a defect not apparent on the face of the bill or note. The signature of the drawer or maker, is itself an assurance that his obligation has been perfected by delivery; and it being necessary that the loss should fall upon one of two innocent parties it should fall upon the one whose act had opened the door for it to enter. In Massachusetts this doctrine has been applied in favor of the holder of bank notes which were signed and ready for use, and which were stolen before they had been issued from the vault of the bank in which they were deposited;¹ in Illinois, against the maker of a note who signed it as a mere matter of amusement, and from whom it was stolen by one who saw him sign it, and who passed it to an innocent indorsee;² in England against the acceptor of a bill who tore it in halves with the intention of cancelling it, and afterwards pasted the two pieces together and put them into circulation.³

The doctrine of the text is supported by the views of some of the

¹Worcester County Bank vs. Dorchester, &c., Bank, 10 Cush., 488; Thomson on Bills, (Willson's ed.,) 92.

²Shipley vs. Carrol, 45 Ill., 285.

³Ingham vs. Primrose, 7 C. B., (N. S.,) 82.

text-writers,¹ as well as by the cases cited; but it is not without contradiction from some of the authorities. In Michigan, where the maker of a note payable to the order of B. signed it and left it on a table in a room where his sister and B. remained together, enjoining B. not to take it, as the negotiation pending was not concluded, but B., nevertheless, took it and transferred it to an innocent purchaser, it was held that the maker was not liable, not having been guilty of culpable negligence.² But the reasoning of the court seems to us altogether insufficient; and regardless of settled principles. The question of negligence of the owner has never been considered as entering into the inquiry when the negotiable instruments of third parties payable to bearer have been stolen from the owner, and transferred in trade;³ the purchaser in such cases is protected, and the owner loses even though he had guarded his property with bolt and bar; and if bankers and others who must necessarily be in possession of negotiable securities in the course of trade are not protected, we can discover no principle which can be invoked to protect one who holds his own paper contrary to the ordinary wants and usages of trade.

The want of delivery in the case of an indorsement⁴ can not be pleaded against a *bona fide* holder, any more than in the case of a making, drawing, or acceptance.

CONSIDERATION OF RENEWALS.

§ 39. If the consideration of the original bill or note be illegal a renewal of it will be open to the same objection and defense,⁵ and if the original instrument was obtained by fraud, a renewal of it by the original parties without knowledge of the fraud, would stand upon the same footing.⁶ But if at the time the renewal was executed the

¹Thomas on Bills, (Wilson's ed.,) 92; 1 Parsons N. & B., 114, in which it is said, If a person sign notes in blank, and lock them up in his safe, whence they are stolen, filled up and negotiated, without fault or negligence on his part, he is not liable. Possibly it might be held otherwise, if he make and sign a perfect note, payable to bearer, and it be stolen under similar circumstances; on the ground that, when the instrument is once perfected (although it has never passed out of the maker's hand and consequently has had no inception, as a contract), it is like money; and any one who receives it in good faith, and for a valuable consideration, acquires a perfect title."

²Burson vs. Huntington, 21 Mich., 415.

³Murray vs. Lardner.

⁴Gould vs. Segee, 5 Duer., 266.

⁵Sawyer vs. Wiswell, 9 Allen, 39; Holden vs. Cogrove, 12 Gray.

⁶Sawyer vs. Wiswell, 9 Allen, 39.

parties signing knew of the fraud in the original, they will be regarded as purging the contract of the fraud and can not then plead it.¹

A renewal note to an indorsee for value and without notice would not be open to plea of defect or illegality in the consideration of the original note. The new payee would stand upon the same footing as he did when indorsee for value.²

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¹*Sawyer vs. Wiswell*, 9 Allen, 41.

²*Calvert vs. Williams*, 64 N. C., 168.

Digest of United States Supreme Court Decisions.

[FROM 13TH WALLACE.]

ACCOMMODATION PAPER.

How far an indorsement of paper not yet issued, which indorsement has been requested by a person contemplating taking it, as an "accommodation" to him, binds the indorser: *Yeager vs. Farwell*, 6.

ADMINISTRATOR.—See CAPTURED AND ABANDONED PROPERTY, 2.

AD VALOREM TAX.—See CUSTOMS OF U. S.

AGENCY.

When the agents of insurance companies having agents at a distance from their principal place of business, undertake to prepare the application of the insured, or to make representations to the insured as to the character or effect of his statements or his application, they will be regarded, in so doing, as the agents of the company, not of the person insured; and no limitation of the agent's authority will be binding on parties with whom he deals, unless brought to their knowledge: *Insurance Co. vs. Wilkinson*, 222.

ATTORNEY.

A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls of attorneys practicing in the court: *Bradley vs. Fisher*, 336.

BILL OF EXCEPTIONS.

Dated during the term at which the trial was had, though some days after the trial, is sufficient if it show that the exceptions were taken at the trial: *French vs. Edwards*, 506.

BOUNTY LAWS

Are not laws which constitute "contracts" in such a sense that the laws may not be constitutionally repealed: *Salt Company vs. Saginaw*, 373.

See CONSTITUTIONAL LAW, 9.

CAPTURED AND ABANDONED PROPERTY.

1. By virtue of the Act of 17th July, 1862, authorizing the President to offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war: *United States vs. Klein*, 128.

2. In a claim by an administrator of a deceased person, against the United States, under the Act of March 12th, 1863, relating to, which makes proof that the owner never gave aid or comfort to the rebellion a condition precedent to recovery, it is no bar that the decedent gave such aid or comfort, the property having been taken after the decedent's death and from the administrator, and not from him: *Carroll vs. United States*, 151.

CAVEAT EMPTOR.

Where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, the purchaser can not say, in impeachment of the sale, that he was deceived by the vendor's misrepresentations: *Slaughter's Adm'r vs. Gerson*, 370.

CHARTER.—See CONSTITUTIONAL LAW, 8; CONTRACT, 4.

COLLISION.

The Act of March 3, 1851, limiting the liability of shipowners, includes injuries to other vessels by means of, as well as injuries to cargo on board the offending vessel: *Norwich Company vs. Wright*, 104.

COMMISSIONER OF THE GENERAL LAND OFFICE.

The tenth section of the Act of June 12, 1858, which declares that, in cases of contest between different settlers on the public lands for the right of pre-emption, his decision shall be *final*, means final as to the action of the executive department: *Johnson vs. Towsley*, 72.

COMMON CARRIERS.

Liable on the principle of subrogation to insurance companies who

have paid owners of goods in transit on their roads and destroyed by accidental fire: *Hall & Long vs. Railroad Companies*, 369.

See SUBROGATION, 2.

COMPENSATION.—See CONSTITUTIONAL LAW, 5, 6.

CONFLICT OF JURISDICTION.

I. *Federal and State Courts.*

1. The Circuit Courts of the United States have no power to issue writs of mandamus to State courts, by way of original proceeding merely: *Bath County vs. Amy*, 244; *Watson vs. Jones*, 678.

II. *Federal and State Governments:* See *Constitutional Law*.

III. *State Courts and Federal Government.*

2. A State judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority of the United States, by an officer of that government: *Tarble's Case*, 379.

CONSTITUTIONAL LAW.

1. A statute does not necessarily impair the obligation of a contract because it may affect it retrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided that it leave the obligation of the performance in full force: *Curtis vs. Whitney*, 68.

2. The power of Congress over the public lands, and the effect of its grants, can not be interfered with by State legislation: *Gibson vs. Chouteau*, 92.

3. Whenever a general rule as to property, or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to State limitation: *Railway Company vs. Whitton*, 271.

4. The proviso (sometimes called "The Drake Amendment"), in the Appropriation Act of July 12, 1870, whose substance is, that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, is unconstitutional and void. It invades the powers of both the judicial and of the executive departments: *United States vs. Klein*, 128.

5. It is not necessary that property should be absolutely taken, in

the narrowest sense of that word, to bring the case within the protection of those provisions of the Constitution of the United States and of the several States which declare that private property shall not be taken for public use without just compensation. Such serious interruption to the common and necessary use of property as is *equivalent* to a taking, will bring the case within the meaning of the Constitution: *Pumpelly vs. Green Bay Company*, 166.

6. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property: *Id.*

7. Whenever a State, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void: *White vs. Hart*, 646.

8. A charter to a railroad company, containing an exemption of all its property from taxation, is a contract; and a law subsequently passed, laying a tax on the company's franchise, rolling stock or real property, violates the obligation of the contract, and is void: *Wilmington Railroad vs. Reid*, 264.

9. But "bounty laws," laws encouraging persons to engage in particular trades by bounties, drawbacks, or other advantages, do not constitute contracts: *Salt Company vs. East Saginaw*, 373.

10. The manner and conditions upon which the judicial power of the United States shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion: *Railway Company vs. Whilton*, 270.

CONTRACT.

1. A contract to pay for slaves sold (slavery being at the time when, and the place where, the contract was made, lawful) is valid, and may be enforced though slavery be afterward abolished, and dealing in slaves so become unlawful: *White vs. Hart*, 647.

2. A contract to re-imburse is implied when the Government takes private property for public use: *United States vs. Russell*, 623.

3. Where the Government, during the rebellion, contracted for the purchase of horses on a large scale, there being at the time certain general regulations as to the right of the Government to examine into the soundness of the animals: *held*, that the dealer could not throw up his contract and claim damages from the Government, be-

cause between the time of the contract and the time appointed for examination of the horses the Government adopted certain new regulations, better calculated to protect it against fraud present and future, to which regulations it insisted that these horses should be subjected: *United States vs. Wormer*, 25.

4. A charter to a railroad company, which exempts all its property from taxation, is a contract, and a law subsequently passed laying a tax on its franchise, rolling-stock, or real property, violates the obligation of a contract: *Wilmington R. R. vs. Reid*, 264.

5. What misrepresentation will vitiate a contract of sale and prevent equity from enforcing it: *Slaughter's Adm'r vs. Gerson*, 379.

See BOUNTY LAWS.—CONSTITUTIONAL LAW, 1, 7, 8, 9.

CORPORATION.

1. To be considered for purposes of jurisdiction a citizen of the State creating it: *Railway Company vs. Whitton*, 270.

2. Will be presumed to have power to hold land when bearing such a title as "Sulphur Spring Land Company:" *Myers vs. Croft*, 291.

COURT AND BAR.

Relative obligations and rights of, to each other, fully set forth: *Bradley vs. Fisher*, 336.

CUSTOMS OF THE UNITED STATES.

Goods imported from a foreign country, upon which the duties at the Custom-house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an *ad valorem* tax: *Low vs. Austin*, 29.

DECISION, FINAL.—See COMMISSIONER OF THE GENERAL LAND OFFICE.

DEMAND.—See NEGOTIABLE PAPER.

EQUITY.—See LAND DEPARTMENT, 1, 2.

EVIDENCE.

1. In a suit against an insurance company, where the defense is that certain representations were false, it is no violation of the rule

which prevents the reception of verbal testimony to contradict a written contract to show that in fact the representations, though apparently those of the party assured, were made by the agent soliciting the insurance, and who received the answers to the usual interrogatories put: *Insurance Co. vs. Wilkinson*, 222.

2. In actions for fraud, large latitude given to the admission of: *Ex. Gr.* If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit: *Butler vs. Watkins*, 457.

EXCEPTIONS.—See BILL OF EXCEPTIONS.

EXEMPTION.—See CONSTITUTIONAL LAW, 8; CONTRACT, 4.

FRAUD.—See EVIDENCE, 2.

HABEAS CORPUS.—See CONFLICT OF JURISDICTION, 2.

INDORSEMENT.—See ACCOMMODATION PAPER.

INSURANCE.—See AGENCY; EVIDENCE, 1; COMMON CARRIERS.

INSURER.—See SUBROGATION, 2.

JUDICIAL COMITY.

The construction of a State law upon a question affecting the titles to real property in the State, by its highest court, is binding upon the Federal Courts: *Williams vs. Kirtland*, 306.

LAND DEPARTMENT.

1. Although the action of the Land Department in issuing a patent is conclusive in all courts, and in all proceedings where by the rules of law the legal title must prevail, yet after the title has passed from the Government to individuals, courts of equity may examine whether the Land Office has been imposed on by fraud, false swearing, mistake, or otherwise, and whether the party vested with the legal title does not thus hold but in trust for another. If the claimant has established his right to the land to the satisfaction of the Land Department on a true construction of acts of Congress, but the patent has issued, owing to a wrong construction of them, to

another person, equity will correct the mistake: *Johnson vs. Towseley*, 72.

2. It will equally relieve, in a similar case, where no patent has actually issued: *Samson vs. Smiley*, 91.

LIFE INSURANCE.

In an action on a policy of life insurance, where the defense set up is previous serious personal injury to the assured, not truly represented, the question of such injury is not to be determined exclusively by the impressions of the matter at the time. Its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide from these, and the nature of the injury, whether it was so serious as to make its non-disclosure avoid the policy. The *criteria* of such injury considered: *Insurance Co. vs. Wilkinson*, 222.

MANDAMUS.—See CONFLICT OF JURISDICTION, 1.

MISREPRESENTATIONS.—See CAVEAT EMPTOR; CONTRACT, 5.

MISTAKE.—See LAND DEPARTMENT, 1.

NEGOTIABLE PAPER.

When an indorser of a matured note, not knowing whether demand has or has not been made of the maker, writes to the holder stating that the maker is unable to pay, and promising himself to pay, such indorser will be held to have waived proof of demand and notice, and will be liable as indorser, although without reference to his letter, no demand of payment was made, or notice of dishonor given: *Yeager vs. Farwell*, 6.

NOTICE.—See NEGOTIABLE PAPER.

PARDON.—See CAPTURED AND ABANDONED PROPERTY.

PAROL.—See EVIDENCE, 1.

PRESUMPTION.—See CORPORATION, 2.

PATENT.

In a suit at law where a patent of prior date is offered in evidence as covering the plaintiff's invention, it is no ground for rejecting the prior patent that it does not profess to do the same things that the

second patent does. If what it performs is essentially the same, and its structure and action suggest to the mind of an ordinarily skillful mechanic its adaptation to the same use as the second patent by the same means, this adaptation is not a new invention, and is not patentable: *Tucker vs. Spalding*, 453.

PATENT.—See LAND DEPARTMENT, 1, 2.

PRIOR INCUMBRANCE.—See SUBROGATION, 1.

PUBLIC USE.—See CONTRACT, 2.

PURCHASER.—See SUBROGATION, 1.

RE-IMBURSEMENT.—See CONTRACT, 2.

SLAVES.—See CONTRACT, 1.

STATE LEGISLATION.—See CONSTITUTIONAL LAW, 2, 3, 7.

SUBROGATION.

1. A purchaser of real estate, who after purchasing has paid off certain unquestionable early incumbrances, but whose purchase has been afterwards set aside as a fraud on creditors, can not, on his purchase being set aside, come into equity and ask either to be repaid the money which he applied in discharge of the incumbrances, or to be subrogated to the rights of their holders: *R. R. Co. vs. Soutter*, 517.

2. An insurer of goods, consumed and totally destroyed by accidental fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid by suit in the name of the assured: *Hall & Long vs. The R. R. Companies*, 367.

See COMMON CARRIER.

TAXATION.—See CONSTITUTIONAL LAW, 8; CONTRACT, 4.

WAIVER.—See NEGOTIABLE PAPER.

SELECTED DIGEST OF STATE REPORTS.

[For this number of the REVIEW selections have been made from the following State Reports: 43 Georgia; 3 Heiskell, (Tennessee); 35 Indiana; 32 Iowa; and 47 New York.]

ACCOUNTS.

From another county or State, set-off or recoupment.—Where an account comes from another State properly proved by the affidavit of the party, a set-off or recoupment may be pleaded without being sworn to: *Briggs vs. Montgomery*, 673; 3 Heiskell's Tenn. Reports.

ACTION.

Equitable jurisdiction.—A person having the equitable title to land can not recover in an action at law on the ground that the legal or paper title is based upon fraud. The legal title must first be attacked and declared void by an action in chancery: *Walker vs. Kynett et al.*, 524, 22 Iowa.

ADDITIONAL EVIDENCE.—See APPEAL, 2.

ADMISSIONS.—See EVIDENCE.

AGREEMENT TO EXTEND TIME.—See PRINCIPAL AND SURETY, 2.

ALIENATION OF REAL ESTATE.

1. *Restriction of.*—A grantor of real estate may limit or restrict the power of alienation for a period of time, but an absolute prohibition is void: *Andrews vs. Sparlin et al.*, 262, 35 Ind.

2. *Deed—Construction.*—The language of a deed was as follows, A. and B. his wife, convey and warrant to C. her lifetime, and after her death to descend to the heirs of her body," certain real estate. "The said C., in consideration of this deed, receipts and forever quits to any further interest in and to her father's real estate whatever, and that a transfer of said real estate by C. shall in no wise be valid: *Ib.*

Held: That the deed conveyed a fee simple absolute to the grantee.

Held: Also, that the grantee possessed the right of alienation, and that an alienation by her completely cut off all her heirs: *Ib.*

ANSWER.—See CHANCERY PLEADING, 2.

APPEAL.

1. *Construction of language of charge.*—An appellate court will not seize hold of isolated portions of a charge for the purpose of discovering error. If the charge, as a whole, conveys to a jury the correct rule of law upon a given question, the judgment will not be reversed. If the language used is capable of different constructions, that one will be adopted which will lead to an affirmance of the judgment, unless it fairly appears the jury were, or at least might have been, misled: *Caldwell vs. The N. J. Steamboat Co.*, 282, 47 N. Y. Reports.

2. *Additional evidence after testimony closed.*—After the testimony in a case has closed, it is discretionary with the court whether to open the case or not, to receive additional evidence, and the decision is not reviewable here: *Id.*

3. *Motion to vacate or set aside judgment.*—Where the court has acquired jurisdiction of the subject matter of an action or proceeding, it has jurisdiction to render judgment, and if error is committed, the judgment is voidable, not void, and the remedy of the party aggrieved is by appeal. It is only where a judgment is void that a party has an absolute legal right to have it set aside or vacated upon motion. An order, therefore, denying a motion to set aside a judgment in a case where the court below had jurisdiction, is not appealable to this court: *Schuetzler vs. Gardiner*, 404, 47 N. Y.

4. *General exceptions to charge.*—Where various requests are made to the court below to charge, some of which are substantially complied with in the charge, a general exception to the refusal to charge each of the requests submitted, except so far as embraced in the charge delivered, and to every part of the charge which is inconsistent with such requests, presents no question for review in this court: *Ayrault vs. Pacific Bank*, 570, 47 N. Y.

5. *Parties—Former decree.*—A decree of the Supreme Court, made upon an appeal by part only of the defendants interested, though the opinion of the court shows a doubt as the power of the court to bind the others, infant defendants, will affect the rights of the parties as to whom no appeal is prayed, unless such rights are saved by the decree. But if it appears from the opinion, and the manner in which the case was presented, that a particular question was not presented, or intended by the parties to be passed upon on the appeal, the court will not, on a subsequent appeal, be precluded from an examination of the question: *Reynolds vs. Braudon*, 593, 3 Heiskell's Tenn. Reports.

APPORTIONMENT.—See ASSESSMENT AND TAXATION, 12.

ARBITRATION AND AWARD.

An award of arbitrators is conclusive as to all matters submitted to them by the parties, but if it is *doubtful*, from the terms of the submission, whether certain matters were submitted to and passed upon by the arbitrators, it is competent for the court to admit evidence as to the truth of the facts of the case, and then to charge the jury as to the law applicable thereto: *Keaton vs. Mulligan*, 308, 43 Ga.

ASSESSMENT AND TAXATION.

1. *Power of apportionment.*—The power of apportionment is included in the power to impose taxes, and is vested in the legislature; and in the absence of any constitutional restraint, the exercise of this power by it can not be reviewed by the courts: *Gordon vs. Cornes*, 608, 47 N. Y.

2. Where a tax is imposed upon a particular locality to aid in a public purpose, which the legislature may reasonably regard as a benefit to that locality, as well as to the State at large, inequality in the apportionment of the expenses of the undertaking, with reference to the benefits resulting to the State and the locality, can not be alleged for the purpose of impugning the validity of the act: *Id.*

ASSIGNMENT.

1. The law presumes, as against a debtor, in the absence of proof to the contrary, that an assignment of the demand against him was made with due authority and upon a good consideration; also, that it is fair rather than fraudulent. The fact, therefore, that an assignment by a president of a bank was in consideration of a private indebtedness on his part to the assignee, is not sufficient to raise a presumption in favor of the debtor, that the assignment was without authority and in violation of duty, and does not affect the validity of the assignment: *Belden vs. Meeker*, 307, 47 N. Y.

2. An assignee of a mortgage, although a *bona fide* holder, takes the same subject to all defences existing between the original parties: *Ingraham vs. Disborough*, 421, 47 N. Y.

AWARD.—See ARBITRATION AND AWARD.

BAILMENT.

Loan of property.—Where the plaintiff, having a horse for which

he had no use, to avoid the expense of keeping, requested the defendant to take it and do his work with it in consideration of its feed and keeping, it was *Held*: That this was not a mere *commodatum* or gratuitous loan, under which the defendant would be required to exercise extraordinary care, but a contract for the mutual benefit of both parties, under which the defendant was required to exercise only ordinary care in the keeping and care of the animal: *Chamberlain vs. Cobb*, 161, 32 Iowa.

BANKRUPT LAW.

1. *Equity of redemption*.—An assignee in bankruptcy acquires the equity of redemption of the bankrupt in his real estate, subject to an outstanding mortgage: *Winslow vs. Clark*, 261, 47 N. Y.

2. *Same*.—Where the mortgage is foreclosed without making the assignee in Bankruptcy a party, his right to redeem is not impaired. He may enforce it as against the purchaser at the mortgage sale, as his grantor; *Ib*.

3. *Same—Purchaser at mortgage sale necessary party*.—The purchaser at the mortgage sale or his grantee becomes, as to the assignee in bankruptcy, mortgagor in possession, and is a necessary party to an action to redeem: *Ib*.

4. *Same—Conversion*.—The assignee in bankruptcy can not maintain a personal action against the mortgagor, or the purchaser at the mortgage sale, for the value of the equity of redemption, as upon a conversion. Such a case is not within the thirty-fifth section of the bankrupt law: *Ib*.

5. *State insolvent laws—Jurisdiction*.—The enactment of the Federal bankrupt law of 1867 did not operate to nullify, supersede, or wholly suspend the insolvent laws of the several States; and jurisdiction may be exercised under the State laws, at least until the jurisdiction of the Federal court has been called into exercise: *Reed Bros. & Co. vs. Taylor et al.*, 209, 32 Iowa.

BANKRUPTCY.

Where one filed his petition to be declared a voluntary bankrupt, and ten days thereafter a tract of land belonging to him was sold by the sheriff, under a fi. fa. from a court of this State against the petitioner, which had been previously levied, and the petitioner was afterwards declared a bankrupt, but died before the proceedings in relation to his bankruptcy were concluded, *Held*: That the sale by the sheriff was a good sale, and divested the title of the bank-

rupt; that no title to the property ever vested in the assignee, and the purchaser at the sheriff's sale got a good title, even as against the wife's right of dower, under the laws of this State: *Thompson vs. Moses*, 383, 43 Ga.

BILL AND AMENDED BILL.—See CHANCERY PLEADING, 1.

BILL OF REVIEW.—See CHANCERY PLEADING, 2, 3.

BOND.—See CONTRACT, 2; EXECUTOR, 1.

CHANCERY PLEADING.

1. *Bill, and amended bill.*—Where original and amended bills are filed, they are both to be looked to, to support the complainant's case, on demurrer to the amended bill: *Bradley vs. Dibbel*, 522, 3 Heiskell, Tenn. Reports.

2. *Bill of Review.*—*Answer.*—*May contest what.*—An answer to a bill of review can not go behind the decree attacked, to again put in issue matters which were in issue before the decree: *Saunders vs. Gregory*, 567. *Ib.*

3. *Same.*—*New matter.*—*Waiver.*—A bill of review, alleging that the fund in complainant's hand had been received in Tennessee money, and other funds, which had become depreciated since received, not being demurred to for want of leave to file it; held good, and that want of leave was waived: *Ib.*

4. *Innocent purchaser.*—*Plea of.*—A statement in an answer, by the purchaser of land, under a mortgage given to a surety, that when he purchased he paid a part of the purchase money to the mortgagee and it was his understanding that the mortgage debts were to be paid, that he thought he had a good title, and that a purchaser from him understood it in that way, is not good as a plea of innocent purchaser: *Saylor's vs. Saylor's*, 525. *Ib.*

CHANCERY SALE.

1. *Bill to sell to pay debts and for partition.*—A bill to sell land and slaves to pay debts, and for distribution, may be maintained upon the ground of necessity to sell for partition and distribution though the case made for necessity to pay debts wholly fail: *Fullton vs. Davidson*, 614, 3 Heiskell, Tenn. Reports.

2. *Allowance to Commissioner.*—*Considerations which affect.*—A commissioner having made one sale, when the compensation allowed by law was inadequate—on a re-sale the court allowed, the law having

been changed, a more liberal compensation on account of the insufficiency of the other allowance. *Ib.*

3. *Same*.—*Change of law pending service*.—The rate of compensation being changed, after a sale, but before collection of notes, etc., the court below allowed the higher rate, and the Supreme Court refused to disturb it: *Ib.*

4. *Purchaser*.—*Loss on re-sale*.—A party buying lands at a chancery sale, and failing to pay according to the terms of sale, is liable on a re-sale to the payment of any deficiency in price: *Ib.*

COMPENSATION.—See CHANCERY SALE, 2, 3.

CONDITION.—CONSTRUCTION, 2.

CONSTITUTIONAL LAW.

1. *Taxation and Representation*.—The power to be conferred upon counties to tax can not, by any special or local law, be taken from Justices of the Peace as a county court, and conferred on local tribunals of particular counties, composed even temporarily of commissioners appointed by the Governor. Taxation by the county court preserves the principle of taxation by the representatives of the taxpayers which the other system infringes: *Pope vs. Philfer*, 682, 3 Heiskell, Tenn. Reports.

2. *Privilege*.—*Defined*.—The exercise of any occupation or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the constitution: *State vs. Schlier*, 281. *Ib.*

3. *Contra pacem*.—Omission of *contra pacem* in indictments fatal because required by the constitution: *Rice vs. State*, 215. *Ib.*

4. *Venue*.—The Code, 5242, sub. sec. 9, which prohibits the reversal of a judgment "because the bill of exceptions omits to state that the venue was proven in the court below," is contrary to the constitution: Art. 1. sec. 9. *Mayer vs. State*, 430; *Alexander vs. State*, 475. *Ib.*

5. *Jury*.—The Act of 1866, c. 5, sec. 1, declaring that persons not qualified voters were subject to challenge as jurors, was unconstitutional and void: *Gibbs vs. State*, 72.

CONSTRUCTION.

1. *Intent to prevail*.—The construction of an instrument is to be arrived at, not only from its terms, but from the circumstances under

which it is made, the motives which induced it, and the purposes and objects of it: *Hyde vs. Darden*, 515, 3 Heiskell, Tenn Reports.

2. *Condition.—Precedent or Subsequent.*—Whether a condition be precedent or subsequent depends upon intention, not form: *Ib.*

3. Law of costs to be liberally construed: *Williams vs. State. Ib.*

4. The established canons of construction applicable to statutes, to-wit, that the intent of the law-maker is to be sought for, and, when discovered, is to prevail over the literal meaning of the words of any part of the law; and that this intent is to be discovered, not alone by considering the words of any part, but by ascertaining the general purposes of the whole, and by considering the evil which existed calling for the new enactment, and the remedy which was sought to be applied, apply as well to the construction of a constitution as to that of a statute law. A constitution is also to be held as prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend to be set in practical operation: *People ex rel. Jackson vs. Potter*, 375, 47 N. Y.

5. *Statutes.—Legislative intent.—Contemporaneous acts.*—A statute should be so construed as not to work a public mischief unless required by words of the most explicit and unequivocal import. In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. Words absolute in themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute to other acts, *in pari materia*, passed before or after, or to the existing circumstances and facts to which they relate. So, also, cotemporaneous legislation, although not precisely *in pari materia*, may be referred to for the same purpose. Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. A clause in a statute purporting to repeal prior statutes is subject to the same rules of construction, and although general and unqualified, if an intent appear to give the language a qualified or limited sense, the intent must prevail over the literal interpretation: *Smith vs. The People*, 330, 47 N. Y.

See APPEAL, 1; ALIENATION OF REAL ESTATE. CONTRACT, 1.

CONSTRUCTIVE NOTICE.

The record of an assignment of a mortgage is constructive notice as against a grantee of a mortgagor, that the mortgagee can no longer

deal with the mortgaged interests; and a subsequent discharge or release of the lien of the mortgage executed by him is invalid: *Belden vs. Meeker*, 307, 47 N. Y.

CONTRA PACEM.—See CONSTITUTIONAL LAW, 3.

CONTRACT.

1. *Construction.—Bond.—Mistake of law.*—A mistake on the part of a person executing an instrument as to its legal effect, or that it has an effect different from that intended, cannot avail to avoid that construction of the instrument which the language used and the rules of law as applied thereto require: *Moorman & Green vs. Collier et al.*, 265, 32 Iowa.

2. So held, in respect to a bond given to an officer for the release of attached property, and which was intended as a delivery bond, but which bound the obligor to pay the judgment rendered against the attachment defendant: *Ib.*

CONVERSION.—See BANKRUPT LAW, 4.

CONVEYANCE.

1. *Warranty.—Measure of Damages.—Vendor and Vendee.*—While an eviction by judgment of law is not necessary in order to entitle the grantee of real estate to maintain an action on the covenants of warranty, and while it is sufficient if he yield the title to one paramount, yet if he so yields or buys in an outstanding one, he does so at his peril; and in an action on the covenant, in such case, the burden is upon him to show that the title to which he yielded or bought in was paramount to that of his grantor: *Thomas vs. Stickle et al.*, 71, 32 Iowa.

2. This rule applies as well to cases of a vendee holding under a title bond of the usual character and form from his vendor as to cases of a grantee holding under an absolute conveyance, with covenants of warranty from his grantor: *Ib.*

3. *Covenants.—Mortgage.*—The grantee, in a deed of trust, is entitled to the benefit of covenants running with the land: *Devin vs. Hendershott*, 192, 32, Iowa.

4. And it seems the same rule would apply in case of a mortgage: *Ib.*

COSTS.

Want of Jurisdiction.—Change of Venue.—Where a change of venue, prohibited by the constitution, is ordered and the court to

which the change is made, in consequence, has no jurisdiction, it can render no judgment for the costs of a trial which has taken place there; nor can the court of the county from which the cause came: *The State vs. Logston*, 276, 3 Heiskell, Tenn. Reports.

See CONSTRUCTION, 3.

COVENANT.—See CONVEYANCE, 3.

CRIMINAL LAW.

1. *Right to keep and bear arms.*—The citizen has, at all times, the right to keep the arms of modern warfare, and to use them in such manner as they may be capable of being used without annoyance and hurt to others, in order that he may be trained and efficient in their use: *Andrews vs. State*, 165, 3 Heiskell, Tenn. Reports.

2. *Same.—Regulation of Arms of warfare.*—The right to keep arms of warfare can not be prohibited by the legislature under the permissive clause of the constitution of 1870, allowing the legislature to regulate the “wearing” of arms. The use of such arms may be restricted as to manner, time or place, due regard being had to the right to keep and bear, for the constitutional purpose, but cannot be prohibited: *Ib.*

3. *Embezzlement.*—A mere failure to pay over state revenue is evidence of embezzlement: *State vs. Cameron*, 78. *Ib.*

4. *Same.—Offense of omission to pay.*—This offense is one of the will, to be ascertained from passive conduct in failing to take or send the money to the Treasury: *Gibbs vs. State*, 72. *Ib.*

5. *Insanity.—Opinion of unprofessional witnesses.*—In criminal cases unprofessional witnesses may be asked, after giving the circumstances and conduct of the party, to state their opinion as to his sanity; and the exclusion of such evidence offered by a defendant, is error: *Dove vs. State*, 348, 3 Heiskell, Tenn. Reports.

6. *Same.—Quantum of proof.—Doubts.*—A charge that “the proof of insanity must be as clear and satisfactory, in order to acquit, as the proof of the crime ought to be to find a sane man guilty,” or to charge that if the jury have a reasonable doubt as to the insanity of defendant they ought to convict, is error: *Ib.*

7. *Self-defense.*—Past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will then be executed. The danger must be present, apparent and imminent, and the killing must be done

under a well founded belief that it is absolutely necessary for the defendant to kill at that moment, to save himself from a great or like injury: *Williams vs. State. Ib.*

DAMAGES.—See RECOUPMENT.

DECREE.—See CHANCERY PLEADING, 2.

DEDICATION.

1. *Public Grounds.—Injunction.*—Where the owner of lands lays out a town thereon and sells lots to purchasers with reference to the plat thereof, the purchasers of such lots acquire as appurtenant thereto a vested right in and to adjacent grounds designated on such plat as public grounds, to the full extent such designation imports, and a diversion of the same from such purpose by the proprietor will be restrained by injunction at the instance of a purchaser: *Fisher, et al., vs. Beard*, 346, 32 Iowa.

2. *Change of plat.*—Nor can this right of purchasers be affected by a subsequent change of the plat by the proprietor, without their consent: *Ib.*

3. *Parol dedication.*—A dedication of public grounds, at least so far as purchasers are concerned, may be made by acts *in pais*, and established by parol representations of the proprietor to purchasers of lots at the time of sale, that the space in question should remain public and unoccupied: *Ib.*

4. To constitute a public use it is not requisite that the public at large shall be entitled to share its advantages, but it is sufficient if it may be enjoyed by a portion of the inhabitants: *Ib.*

5. *Statute of limitations.*—The statute of limitations will not begin to run as against the rights of persons purchasing lots under representations of the proprietor that an adjacent space should remain public and unoccupied, until he does some act inconsistent therewith: *Ib.*

DEED.

It is not within the constitutional power of Congress, to prescribe for the States a rule for the transfer of property within them. A deed, therefore, is not invalid because not duly stamped: *Moore vs. Moore*, 467, 47 N. Y.

DEFENSE.—See ASSIGNMENT, 2

DEMURRER.—See CHANCERY PLEADING, 1, 3.

DISTRIBUTION.—See CHANCERY SALE, 1.

EASEMENT.

The owner of the soil upon which surface waters stand, or through which they soak, has the right to lead them off in such direction and in such quantity as he sees fit, taking care only that he does not injure his neighbor by discharging them upon him in an unusual quantity or at an unusual place, and has the right, at his pleasure, to change the direction of the drainage. But where the owner of a tract of land, upon which there was a marsh, has dug a ditch therefrom through other portions of the tract, making a permanent channel in which the waters gathered in the marsh flow in a continuous stream, mutually benefitting the lands drained and the lands to which is conveyed a supply of good water, and subsequently and while these reciprocal benefits and burdens were existing and apparent, has divided the tract into parcels, and conveyed the parcels to different grantees, who contracted with reference to such a condition of the lands, the respective grantees have no right to change the relative condition of one parcel to the injury of another: *Curtis vs. Ayrault*, 73, 47 N. Y.

EJECTMENT.

1. In an action to recover the possession of real estate in the occupancy of tenants of one claiming title adverse to plaintiff, the landlord is a necessary party, and the presence of the tenant is not essential to enable him to litigate the title. He may, therefore, waive the defect of the non-joinder of the tenant as a party defendant, and the not taking the objection by demurrer or answer is such waiver: *Finnegon vs. Carraher*, 493, 47 N. Y.

2. Defendant (the landlord), at the time of the service of the summons and complaint upon him in such an action, told plaintiff's attorney, by whom they were served, that he lived in and was in possession of the house in question, and upon the faith of that statement the attorney served the papers upon him. *Held*, That the defendant was estopped from denying that he was in the actual possession of the premises at the time of the commencement of the action, by his declaration, and by receiving and retaining the complaint, without objection, that he was not the proper party: *Ib.*

EMBEZZLEMENT.—See CRIMINAL LAW, 3, 4.

EQUITABLE JURISDICTION.—See ACTION.

EQUITY OF REDEMPTION.—See BANKRUPT LAW, 1, 2, 4.

ESTOPPEL.—See EJECTMENT, 2.

EVIDENCE.

Admissions or declarations.—The declarations or admissions of a co-defendant or third person, in regard to the commission of an offense, when made after the offense is committed, are not admissible as evidence for a defendant: *Sible vs. State*, 137; 3 Heiskell's Tenn. Reports.

See MAL-PRACTICE.

EXECUTOR.

1. *Sale of Real Estate by Foreign Executor—Bond.*—In a proceeding for the sale of real estate in this State by a foreign executor, the sale is to be authorized in the same manner, and upon the same terms, as in the case of an executor appointed in this State, except that if it is shown that sufficient surety for the application of the proceeds has been given in the State or county where the executor was appointed, and a duly authenticated copy of such bond is filed in the court where the petition is made, no further bond will be required: *Rapp et al. vs. Mathias*, 332, 35 Ind.

2. *Petition for Sale of Real Estate by Foreign Executor.*—The petition must show: 1st. What amount of personal property, if any, has come to his hands; 2d. The amount of the debts outstanding against the estate of the deceased, so far as the same can be ascertained, and the insufficiency of the personal estate to pay the same; 3d. A description of the real estate of the deceased liable to be made assets, showing the State and county where the same is located; 4th. The names and ages of the heirs, legatees or devisees of the deceased; 5th. That the executor has filed in the court an authenticated copy of his appointment; 6th. That the will of the testator has been duly probated: *Id.*

FORECLOSURE.

1. In an action brought by the assignee of a mortgage to foreclose the same, the mortgagor has the right to set up and prove a mistake in the drawing of the instrument, and have the same reformed: *Andrews vs. Gillespie*, 487, 47 N. Y.

2. When the mistake is in the terms of payment, delay in moving to correct the mistake, and payment by the mortgagor of an installment, or a promise to pay as specified in the mortgage, under protest, asserting the mistake, furnish no ground for a denial of the relief to which he is entitled; nor will the absence of the assignor as a party bar him from such relief: *Id.*

3. The assignor is not a necessary party to the action, as upon the coming in of the answer, and notice thereby of defendant's claim, plaintiff may give notice of such claim to the assignor, and offer to him the future management of the suit, which would make the judgment binding upon him in respect to the fact of the mistake: *Id.*

FORMER DECREE.—See APPEAL, 5.

FRAUD.—See LIMITATION OF ACTIONS.

FRAUDULENT CONVEYANCE.

Vendor retaining possession.—The mere fact of a mortgagor remaining in possession of personal property, and of his afterwards disposing of it without the consent of the mortgagee, does not prove the deed fraudulent, or avoid it as to the lands conveyed in the same deed: *Saylors vs. Saylors*, 525; 3 Heiskell's Tenn. Reports.

GENERAL EXCEPTIONS.—See APPEAL, 4.

GROWING CROPS.—See SALE OF PERSONAL PROPERTY.

HEIRS.—See ALIENATION OF REAL ESTATE; WILL.

INDICTMENT.—See CONSTITUTIONAL LAW, 3.

INJUNCTIONS.

1. If a meritorious bill of exceptions be dismissed here because of a mistake made by the certifying Judge and without the fault of counsel, equity will restrain the enforcement of the judgment thus affirmed till the matters set up in the dismissed bill of exceptions can be heard: *Kohn vs. Lovett*, 179, 43 Ga.

2. A court of equity will not enjoin the vendor of a tract of land from the collection of the purchase money due therefor by the vendee, when the latter is in possession of the land, on the ground of a bare fear of failure of the vendor's title; the complainant must allege such facts in his bill as will *affirmatively* show such a prior incumbrance or outstanding title as will defeat the vendor's title, under which the vendee holds possession of the land: *Cantrell vs. Cobb*, 193, 43 Ga.

See DEDICATION, 1; LANDLORD AND TENANT, 2.

INNOCENT PURCHASER.—See CHANCERY PLEADING, 4.

INSANITY.—See CRIMINAL LAW, 5, 6.

INTENT.—See CONSTRUCTION, 1, 4, 5.

INTENDMENT.—See LIMITATION OF ACTIONS.

INTERNATIONAL LAW.

1. *Commercial intercourse between belligerents.*—In time of war, all commercial or business intercourse between the citizens of the different States, without the direct permission of the government, is unlawful: *Hill vs. Baker*, 303, 32 Iowa.

2. *Rule applied.*—It is accordingly *Held*: That a purchase of real estate lying in Iowa by, and a conveyance thereof to, a citizen of Ohio from a citizen of Virginia, while the latter State was in rebellion against the United States, was unlawful and void: *Ib.*

IRREGULAR REGISTRATION.—See NOTICE.

IRREGULAR SALE.—See JUDICIAL SALE, 1, 2.

JUDGMENTS.

Void and voidable.—A judgment before a Justice of the Peace, before the return day of the warrant, is not void but erroneous: *Glover vs. Holman*, 519, 3 Heiskell's Tenn. Reports.

JUDICIAL SALE.

1. *Consequence of irregular sale.*—It is not competent for a defendant in execution, whose land has been irregularly sold thereunder, to pay off the judgment against him, and having succeeded in getting the sale set aside on the ground of irregularity, compel the purchaser to look to the sheriff or to the plaintiff for re-imbursement of the amount paid by him. In such case the court will, on motion of the purchaser, set aside the credit on the judgment to the extent of his bid and order a re-sale of the land for the purpose of indemnifying him: *Fleming vs. Maddox et al.*, 493, 32 Iowa.

2. To prevent such re-sale the defendant must himself re-imburse the purchaser: *Ib.*

See SALE.

JURISDICTION.

New county—Offense before creation of—Venue.—If a county is divided, and a portion of its territory goes into the formation of a new county, a criminal act done before the division, within the ceded territory, can be prosecuted only within the new county. The charge, as to place, may state the offense in the new county: *State vs. Donaldson*, 48, 3 Heiskell's Tenn. Reports.

See BANKRUPT LAW, 5; COSTS.

JURY.—See CONSTITUTIONAL LAW, 5.

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LANDLORD AND TENANT.

1. *Lien—Injunction.*—Where a tenant leases property for a term of years, the lien of the landlord attaches at the commencement of the term, upon the property brought upon the demised premises, for the rent to become due or that will accrue during the entire term: *Garner et al. vs. Catting et al.*, 547, 32 Iowa.

2. And the landlord may have an injunction to restrain the sale and removal of the property from the demised premises by the tenant or his assignee. Day, Ch. J., dissenting: *Id.*

3. *Notice to quit.*—Where a tenant is in possession under a parol agreement void by the statute of frauds, and has occupied for a year, paying the rent monthly, this creates a tenancy from month to month, which can only be terminated by a month's notice to quit, expiring with the end of some month reckoning from the beginning of the tenancy: *People ex rel vs. Darling*, 666, 47 N. Y.

LEGAL TITLE.—See ACTION.

LIEN.—See LANDLORD AND TENANT, 1.

LIFE ESTATE.—See WILL.

LIMITATION OF ACTIONS.

Knowledge of facts constituting fraud—Intendment.—The fact that a conveyance made by an insolvent debtor is without consideration, is a controlling fact upon the question of fraud; and where the conveyance purports upon its face to be for a valuable consideration, knowledge of its existence, and that the grantor is insolvent, can not be deemed knowledge of facts constituting fraud. Until a creditor of the insolvent learns that the conveyance was without consideration, he can not be said to have discovered the facts constituting the fraud. Where a suit, therefore, to set aside such conveyance is commenced more than six years after knowledge of the conveyance and insolvency, but within six years after discovery of the fact that the conveyance was without consideration, the referee is justified in finding that the suit was commenced within six years after the discovery of the facts constituting the fraud; and such finding if not expressly made will be supplied by intendment in support of the judgment: *Erickson vs. Quinn*, 410, 47 N. Y.

LOAN.—See BAILMENT.

MALPRACTICE.

Evidence.—In an action against a physician for malpractice and neglect: *Held*, That the admission of evidence that defendant had not presented any bill or asked any pay for his services, was error: *Baird vs. Gillett*, 186, 47 N. Y.

MASTER AND SERVANT.

Negligence—Common Employment.—Plaintiff was employed as a draughtsman in defendant's machine shop. One evening in going home, plaintiff fell over a pile of rubbish which had been thrown out in excavating the cellar of the shop, and left on the pavement of the public street, a few feet from the steps of the building. Plaintiff was thereby injured and brought this action. *Held*:

1. In accepting his employment, the plaintiff took upon himself all the risks necessarily incident to the business, including the negligence of servants in the same common employment with himself.

2. Servants are engaged in the same common employment, when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent.

3. The negligence which occasioned the plaintiff's injury was not one of the risks which he assumed on entering into the defendant's employment.

4. The relation of master and servant did not exist between the parties when plaintiff received the injury: *Baird vs. Pettit*, S. Ct. of Penn., Nov. 4, 1872.

MISTAKE.—See CONTRACT 1; FORECLOSURE 1, 2; INJUNCTION 1.

MORTGAGE.

1. *By Deposit of Title Deeds.*—A mortgage by parol and deposit of title deeds is not valid in Tennessee: *Meador vs. Meador*, 562, 3 Heiskell, Tenn. Reports.

2. *To Surety, Available to Creditor.*—A mortgage executed by a debtor directly to a surety, to be void if the debts are paid, is for the security of the creditors as well as the surety: *Saylors vs. Saylors*, 525, 3 Heiskell, Tenn. Reports.

3. *Sale by Mortgagor and Mortgagee.*—Such mortgage made without a power of sale by the mortgagee, precludes a sale of the property by the mortgagor, with the consent but without the joinder of

the mortgagee, unless with consent of the creditors, or with satisfaction of their debts. A payment to the surety will not be sufficient: *Ibid.*

See Bankrupt Law, 1, 2, 3; Chancery Pleading, 4; Conveyance, 4; Foreclosure, 1, 2.

MOTION TO VACATE JUDGMENT.—See APPEAL 3.

MUTUAL BENEFIT.—See BAILMENT.

NEGLIGENCE.—See MASTER AND SERVANT.

NECESSARY PARTY.—See BANKRUPT LAW, 3; FORECLOSURE, 3; SURETY, 2.

NEW MATTER.—See CHANCERY PLEADING, 3.

NON-JOINDER.—See EJECTMENT, 1.

NOTICE.

The *irregular* registration of a prior deed is not notice to a subsequent purchaser from the same vendor, whose deed has been *regularly* recorded within the time prescribed by law: *Williams, et al., vs. Adams*, 407, 43 Georgia.

See Revocation.

NOTICE TO QUIT.—See LANDLORD AND TENANT, 3.

OMISSION.—See CONSTITUTIONAL LAW, 3.

PART PERFORMANCE.—See STATUTE OF FRAUDS, 3.

PAROL.—See DEDICATION, 3.

PARTIES.—See APPEAL, 5.

PARTITION.—See CHANCERY SALE, 1.

PRESUMPTION OF ACCEPTANCE.—See STATUTE OF FRAUDS, 2.

PRESUMPTION OF LAW.—See ASSIGNMENT, 1.

PRINCIPAL AND SURETY.

1. *Discharge of Surety.*—To discharge a surety on account of indulgence granted to the principal, the indulgence must be for a definite period of time, and founded upon a new consideration. There must be a new contract concluded between the creditor and the principal debtor, by which the hands of the former are tied for a definite period of time from suing the latter: *Menifee vs. Clark*, 304, 35 Ind.

2. *Consideration—Agreement to Extend Time.*—Where A. and B. had been partners, and B. made a note to A., with C. as his surety, in a suit upon the note by an assignee of A., C. answered that when the note became due, and before the assignment to the plaintiff, and without his knowledge or consent, it was agreed between A. and B. that in consideration that B. should apply certain money in his hands to the payment of outstanding partnership debts of A. and B. the time of the payment of the note of B. to A. should be extended;

Held, That the agreement to apply the money in the hands of B. to the payment of the partnership debts of A. and B. was a sufficient consideration to support an agreement to extend the time of payment of the note; and a reply, that it was agreed between A. and B., at the time of the dissolution of the partnership, that B. should pay the debts, will not show the absence or want of consideration: *Ib.*

PRIOR INCUMBRANCE.—See INJUNCTION, 2.

PRIVILEGE.—See CONSTITUTIONAL LAW, 2.

PUBLIC GROUNDS.—See DEDICATION, 1, 2, 3, 4.

PUBLIC SALE.—See DEDICATION, 4.

PURCHASER.—See CHANCERY SALE, 4.

QUIA TIMET.—See SURETY, 1, 2.

REASONABLE DOUBT.—See CRIMINAL LAW, 6.

RECOURPMENT.

Must Arise out of the Matter sued on.—A landlord having contributed to cause injury to his renter's land by trespass of stock, promised that if the renter would not hurt his stock, he would pay for the injuries done by them. On a suit by the landlord for his rent, the lessee offered to recoup the damage by the landlord's stock;

Held, That the damages did not so arise out of the contract sued on as to be a proper subject of recoupment: *Hulme vs. Brown*, 679, 3 Heiskell, Tenn. Reports.

See Accounts.

RELEASE OF LIEN.—See CONSTRUCTIVE NOTICE.

REPRESENTATION.—See CONSTITUTIONAL LAW, 1.

RE-SALE.—See CHANCERY SALE, 2, 4.

REVOCATION.

Notice—Evidence Under General Issue.—In an action for goods sold and delivered, which are claimed to have been purchased by de-

fendant's agent, it is not necessary to set up in the answer a revocation of the authority of the agent, and notice thereof to the plaintiff, prior to the sale. Such evidence is proper under a general denial: *Hier vs. Grant*, 278, 47, N. Y.

RIGHT TO KEEP AND BEAR ARMS.—See CRIMINAL LAW, 1, 2.

SALE.

By Sheriff, Under Agreement of Parties, not a Judicial Sale.—If parties settle a cause by an agreement, part of which is that the sheriff shall sell the property in dispute and divide the proceeds between the parties, and said settlement is made the judgment of the Court, the sale by the sheriff under said agreement is not a judicial sale: *Doyle, et al., vs. The Trustees of the African M. Church, et al.*, 400, 43 Georgia.

SALE OF PERSONAL PROPERTY.

Growing Crops.—A sale of growing crops for their market value, to be determined and paid by the vendee when the crops are ready for market will be regarded as an executory contract, and not sufficient to convey the title as against a creditor of the vendor levying on the property: *Synder vs. Tibbals*, 447, 32 Iowa.

SELF-DEFENSE.—See CRIMINAL LAW, 7.

SET-OFF IN EQUITY.

Against Assignee.—A debt due from the assignor of a judgment to the defendant in the judgment, can not be set-off by bill in equity against a *bona fide* holder of the judgment, without notice. It is otherwise at law, but equity will not actively interfere to grant relief: *Catron vs. Cross*, 584, 3 Heiskell, Tenn. Reports.

SET-OFF.—See ACCOUNTS.

SHERIFF SALE.—See BANKRUPTCY.

STATE INSOLVENT LAWS.—See BANKRUPT LAW, 5.

STATUTE.—See CONSTRUCTION, 4, 5.

STATUTE OF FRAUDS.

What Necessary to Supply Place of Written Contract.—1. No act of the vendor alone, in performance of a contract of sale void by the Statute of Frauds, can give validity to such a contract. Where no part of the price is paid by the vendee, there must not only be a de-

livery of goods by the vendor, but a receipt and acceptance of them by the vendee, to pass the title or make the vendee liable for the price; and such acceptance must be voluntary and unconditional. Some act or conduct on the part of the vendee, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract: *Caulkins vs. Hellman*, 449, 47 N. Y.

2. Evidence of a *bona fide* attempt upon the part of the vendee, immediately upon receipt and examination of the goods, to communicate to the vendor a message declining to accept, is proper, as part of the *res gestae*, and material as qualifying the act of receiving and retaining the goods, and rebutting the presumption of acceptance arising therefrom, although such message was never received by the vendor: *Ib.*

3. *Part Performance of Contract*.—In order to take a case out of the operation of the statute, on the ground that the contract was not to be performed within one year, there must be such a part performance of it on the part of the plaintiff as would render it a fraud on him, by the refusal of the defendant to comply with the contract on his part: *Burnett & Co. vs. Blackman & Chandler*, 569, 43 Georgia.

STATUTE OF LIMITATION.—See DEDICATION, 5.

SURETY.

1. *Bill Quia Timet*.—A surety or assignor, liable to pay a debt on the failure of the principal debtor, may sustain a bill *quia timet* before payment made or loss incurred: *Saylors vs. Saylors*, 525, 3 Heiskell, Tenn. Reports.

2. *Same—Assignee or Creditor, Necessary Party*.—In such case, the assignee ought to be a party to the record, and if he is not, the decree must show that the recovery is for his benefit: *Ib.*

3. A creditor and surety are entitled respectively each to the benefit of the securities of the other for the payment of the debt in which they are interested: *Ib.*

See Principal and Surety.

TAX.—See ASSESSMENT AND TAXATION, 1, 2.

TAXATION.—See CONSTITUTIONAL LAW, 1.

OUTSTANDING TITLE.—See INJUNCTION, 2.

VENDOR OR VENDEE.—See CONVEYANCE, 2.

VENUE.—See CONSTITUTIONAL LAW, 4; COSTS; JURISDICTION.

WAIVER.—See CHANCERY PLEADING, 3; EJECTMENT, 1.

WARRANTY.—See CONVEYANCE, 1.

WILL.

Bequest for Life—Heirs—Children.—A testator bequeathed all his real and personal property to his wife “for her use and benefit during her natural life,” and after her death all that remained unconsumed was to be sold, and one thousand dollars paid to his daughter S., and the balance was to be divided among the heirs of his daughter S., share and share alike; the wife to have the right to sell and dispose of said property, both real and personal, as she wished.

Held, That the wife took only a life estate.

Held, Also, that the evident intention of the testator was to secure his widow a competency, and if it was necessary that she should sell the land, she might do so, but the balance of the estate unconsumed at her death she could not devise.

Held, Also, that the word *heirs*, as used in the clause of the will which gave the estate, except one thousand dollars, to the heirs of his daughter S., meant *children*.

Held, Also, that real estate purchased with the proceeds of the sale of the real estate, devised by the will to the wife for her life, after the death of his wife and the payment of the one thousand dollars to the daughter S., belonging to the children of S.: *Rapp*, et al., vs. *Mathias*, 332, 35 Ind.

Digest of Recent State Reports and Decisions on the Law of Insurance.

[From 43 Georgia, 32 Iowa, 50 New Hampshire, 47 New York, 27 L. T. R., (Q. B.) U. S. Supreme Court, May, 1872, Supreme Court of Illinois, April, 1872.]

ACCIDENT.

1. *Terms of policy.—Presumption of law.*—By the terms of the policy the sum insured was to be paid if the insured “shall have sustained personal injury caused by any accident, * * and such injuries shall occasion death,” etc.

Held, that if a wound received by deceased, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental and defendant liable: *Mallory vs. The T. Ins. Co.*, 52, 47 N. Y.

2. Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries or of a suicidal act of deceased, the presumption of law is against the latter. *Ib.*

ADMIRALTY LAW.

Marine insurance: re-insurance—“to commence from loading at as above.” *outward cargo to be homeward interest after a certain time.*—Declaration upon a policy of insurance under-written by defendants for £1,000, declared to be upon cargo, being a re-insurance, subject to all clauses and conditions of the original policy, in the ship D., at and from any port or ports in any order on the west coast of Africa to the vessel’s port or ports of call and discharge in the United Kingdom, the insurance to commence “from the loading” of the goods at, as above; that it was a clause and condition of the original policy that the insurance made by it should be for £1,000 upon the cargo valued at £3,500 of the said vessel D., at and from Liverpool to any ports in any order backward and forward and forward and backward on the coast of Africa, and thence back to a port of discharge in the United Kingdom, with leave to increase the valuation of the cargo on the homeward voyage; “outward cargo to be considered home-

ward interest twenty-four hours after her arrival at her first port of discharge;" that goods were shipped at Liverpool, and the vessel, with goods on board, departed from a port on the west coast of Africa, and in the course of the voyage in the original policy described, and more than twenty-four hours after she had arrived at her first port of discharge, the goods were lost by perils insured against in the original policy.

Demurrer on the ground that it appeared from the declaration that the goods were not loaded at any port on the west coast of Africa.

Held, that the goods, though shipped at Liverpool, were within the policy of re-insurance after the lapse of twenty-four hours from the vessel's arrival at her first port of discharge on the west coast of Africa. As the policy was declared to be a re-insurance, subject to all clauses and conditions of the original policy, and by the original policy outward cargo was to be considered homeward interest twenty-four hours after the vessel's arrival at her first port of discharge, the words "from the loading" were not to be construed strictly: *Joyce vs. The Realm Marine Insurance Co.*, Q. B., 27 L. T. R. 144.

ASSIGNMENT.

1. *Waiver.*—*Authority of Agent to bind company.*—*Verbal promise.*—*Fire Insurance.*—M. and P. were partners, and their firm building was insured. M. sold to P., who took policy to agent who knew of sale. Agent returned policy which was a renewal of old policy, informing them that it would not be necessary to obtain the consent of the company to the transfer of one partner to another: *Held*, that a mere change of ownership whereby no stranger is introduced, and no addition made to the number of the insured, where there is no change in the condition or situation of the property or risk, a mere assignment of his interest in the concern by one partner to the other, is obviously not within the principle or motives on which the condition is founded.

If the insurer, upon notice of the assignment, makes a verbal promise to the assignee to pay the insurance for him, the assignee can maintain suit in his own name. The condition that assignments should be indorsed on the policy is for the benefit of the company, and the declarations and acts of the agent are competent to be submitted to the jury as evidence of the waiver by the company.

Held, also, that the agent's knowledge and new promise or consent to the continuance of the policy for the benefit of P., must be con-

sidered to be that of the company, and the authority of the agent to make such contract must be presumed till the contrary be shown: *Pierce vs. Nashua Ins. Co.*, 50 N. H., 297.

2. *Forfeiture.—Breach of condition.—Waiver.*—The policy contained a condition that in case of any sale, transfer, or change of title in the property insured, the insurance should be void, and cease. A section of the charter of the company—a mutual company, of which the assured became a member—printed on the back of the policy, also provided that the policy should be void upon any alienation of the property, by sale, or otherwise.

At the time the insurance was effected, the insured was the absolute owner of the property. He afterwards made an assignment of the policy to Seibert, the mortgagee, with the assent of the company, and subsequent to this, sold and conveyed the property to three other persons, one of whom re-conveyed to him, and the other two executed mortgages to secure the purchase money.

“The assignee of a policy, takes it subject to the conditions expressed upon its face; and his equities confer no right, if the assignor has lost all right of recovery by a violation of the terms or conditions of the policy.” The assignee knew of the condition in the policy, providing for forfeiture in the event of alienation, and his rights must be controlled thereby.

There was a change of title in the property. The absolute ownership of the entire property, is easily distinguished from the ownership of one-third, and a mortgagee of two-thirds.

The assignment was made with the consent of the company, but the condition of forfeiture, upon alienation, without the consent of the company, was still applicable to the assignee, as well as to the insured. The company did not waive the effect of the breach of the condition. By the act of the insured the policy became void.

It was contended that the memorandum, that the loss, if any, should be payable to the assignee, as his interest might appear, shows that his interest was intended to be protected; and that the change of title did not affect his interest.

The insured can not sue, because he had so acted as to forfeit the policy. The assignee can not sue, for he was not a party to the contract originally. In its nature the policy was only assignable so as to pass an equitable interest to the assignee. Even, as in this case, where the assignment was made with the consent of the company, the assignee can not sue for a breach in his own name: *Home*

Mutual Fire Insurance Co. vs. George Hausleim, for the use of, etc. Supreme Court, Illinois, April 11th, 1872.

CONSTRUCTION.

1. *Conditions construed most strongly against company.—Ambiguous language.—Knowledge by the company.*—Insurance companies are not restricted in the right to insert such terms and conditions in their policies as they see fit; but where equivocal language is used, especially such as is calculated to mislead, it is to be construed most strongly against the company using it: *Reynold's vs. Commercial Fire Ins. Co.*, 597, 47 N. Y.

2. Where the language employed in a policy to specify the purposes for which the building insured may be used is ambiguous, knowledge by the company of the purpose for which it is used is a circumstance proper to be considered in determining the intent: *Ib.*

EVIDENCE.

1. *Admission—Notice—Different policy from that ordered.*—In an action upon a policy of fire insurance covering a stock of goods, which policy expressly declares that only goods “not hazardous,” and “hazardous” were insured, and that the keeping of “extra hazardous” or “specially hazardous” goods on the premises shall avoid the policy.

Held, That evidence showing the application was for a policy upon a stock such as is usually kept in a country store, and that in response to such application this policy was sent, was inadmissible, either as an admission by defendant that the policy was intended to conform to the application, or as notice to the company that the insured kept in his store such merchandise as is usually kept in country stores, including goods coming within the prohibited classes: *Pindar vs. The R. Fire Ins. Co.*, 114, 47 N. Y.

2. The fact that the insured ordered a different policy, and did not discover until after the fire that the one issued was not in accordance with his order, is immaterial. The failure of the insured to read his policy will not enlarge the liability it imposes: *Ib.*

3. *Refusal to answer questions as to real loss—Duplicates of invoices—Forfeiture—Preliminary proofs.*—The plaintiffs, in court below introduced evidence to show that before the fire they had taken an inventory of their stock, which was reduced to writing by one of them, in an inventory book, and that the values were correctly footed up therein, and that, at the same time, these footings were correct-

ly entered by one of the plaintiffs on the fly leaf of an exhausted ledger, and afterwards transferred by one of the plaintiffs to the fly leaf of a new ledger. The plaintiffs offered in evidence the entry of the footings on the fly leaf of the new ledger. Both the inventory book and the exhausted ledger had been destroyed and neither of the plaintiffs could remember the amount of the footings. *Held*, That these entries were properly admitted by the court below.

The policies provided that the assured should, if required, submit to an examination under oath, and until such examination the loss shall not be payable. It is to be understood that the examination relates to matters pertinent to the loss.

The plaintiffs, during the examination, declined to answer the questions respecting the amounts for which they had made settlement with other companies. *Held*, that there was no sufficient foundation laid for an instruction that if the jury should believe the plaintiffs had, in the course of the examination, refused to answer any questions, by which the defendants could fairly estimate or reasonably infer the plaintiffs' real loss, the verdict must be for the defendants. There was no evidence of refusal to answer *such* questions.

A clause in the policy provided that the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and that until they were produced the loss should not be payable. The bills of exception state that there was evidence that the plaintiffs were requested to produce *duplicate* bills. There was no evidence to show when the request was made, whether before the commencement of the action or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. *Held*, that there was no error in refusing to instruct the jury that if they believed from the evidence that the plaintiffs were requested to produce duplicates of invoices, and neglected to do so before the commencement of the action, their right of action never accrued.

The policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in submission of preliminary proofs of loss or in the examination to which the assured agreed to submit.

It does not invariably follow from the fact that a material discrepancy between the statements by the plaintiffs, under oath in their proofs of loss, and when testifying at the trial, that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It is only fraudulent false swearing in furnish-

ing the preliminary proofs that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent: *Republic Fire Ins. Co. vs. Weide*, United States Supreme Court, May 6, 1872.

FRAUD, ACCIDENT OR MISTAKE.

Parol declarations of Agent.—In a suit on a life insurance policy, parol declarations made by the agent of the company prior to the execution, delivery and acceptance of the policy cannot be received to vary or contradict the terms of the written contract, in the absence of any allegation and evidence as to fraud, accident or mistake, at the time of its execution, delivery and acceptance by the contracting parties. *Sullivan vs. The Cotton States L. Ins. Co.*, 423, 43 Ga.

FRAUDULENT CONCEALMENT.

Non-disclosure of former Insanity.

1. Defendant issued an accident policy of insurance upon the life of M., who prior to procuring the policy, had been a canvasser for applications for insurance with defendant. The president had directed him to be cautious, as the company did not wish to insure insane persons, etc. Some time prior to the issuing of the policy, M., had been insane, had been sent to an asylum, and discharged cured, and from that time forward had been sane. He did not disclose the fact of his former insanity upon application for a policy, but stated there were no circumstances rendering him peculiarly liable to accident. Held, that the conversation with the president had no tendency to show a fraudulent concealment of material facts, and that it was not error in the court to charge, that the conversation had no bearing upon the application: *Mallory vs. The T. Ins. Co.*, 52, 47 N. Y.

2. Also held, that the court was correct in charging that if the deceased did not conceal any facts which in his own mind were material, in making the application, the policy was not void: *Ib.*

POWERS.

Incidental Powers.

1. An insurance company, the same as other corporations, possesses all incidental or implied powers necessary or proper to carry into effect its general and express ones in respect to the transaction of its business: *The Home Insurance Co. vs. The Great Western Packet Co.*, 223, 32 Iowa.

Rule Applied.

2. It is accordingly held, where the assured in a policy of insurance upon produce lost in being transported down the Mississippi river

made a claim and instituted suit against the insurance company to recover the amount of the policy, that it was competent for the insurance company, for the purpose of effecting a settlement with the assured, and of the litigation commenced, to arrange with him for, and receive an assignment of the bill of lading and his claim against the owners of the vessel occasioning the loss, and that it might maintain in its own name and recover in an action thereon, the full amount of the loss though it exceeded the amount of the policy: *Ib.*

Settlement of Doubtful Claim.

3. Nor would the claim on the part of the defendants, in such an action, that the vessel on which the produce was shipped was unseaworthy, and that, hence, the policy did not attach nor any liability of the insurers occur thereunder, invalidate such settlement and assignment or affect the right of the plaintiff to recover thereon: *Ib.*

TRUSTEE.

Personal Representative of Assured—Benefit of Third Person.

1. Where, by a policy of life insurance, the sum insured is made payable to the "assured, his executors, administrators and assigns," for the benefit of a third person, an action thereon is properly brought in the name of the personal representative of the assured, who, by the policy, is constituted trustee of an express trust, within the meaning of sec. 113 of the Code: *Greenfield vs. Mass. Mut. Life Ins. Co.*, 430 47 N. Y.

Parties—Beneficiaries—Motion.

2. Where, in such action, upon motion of the insurance company, the beneficiaries named in the policy are ordered to be and are made parties, the company is precluded from objecting that they are not properly joined with it as defendants: *Ib.*

Waiver.

3. An insurance company has the right to waive any of the conditions of the policy as to proof, presentation of the claim, etc., and a promise to pay, with knowledge of the facts, is such waiver. *Ib.*

Digest of Recent State Reports on the Law of Corporations.

[From 8 Bush., (Kentucky,) 32 Iowa, and 47 New York.]

ASSOCIATIONS.

For pleasure Purposes—Can not maintain action.—A member of a voluntary unincorporated association for pleasure purposes, can not maintain an action in his own name upon a contract made with the association; nor has he an interest therein which he can so transfer that his assignee can maintain an action against the contractor with the association. Nor can one member maintain an action at law, in behalf of the association, against another member upon any agreement made with the association: *McMahon vs. Rauhr*, 67, 47 N. Y.

ESTOPPEL.

Capacity to contract.—It seems that where a person contracts with a corporation, he is, under our laws, thereby estopped from denying the validity of its organization and its capacity to contract: *Howe Machine Co. vs. Snow, et al.*, 433, 32 Iowa.

FERRY.

Owner of Ferry can not Recover Damages for loss of Profits by reason of the Erection of a Bridge near by.—The appellants, the owners of exclusive ferry privileges between Cincinnati and Covington, brought this suit against the appellee for damages resulting from a loss of custom sustained by them in consequence of the erection of its bridge, and a diversion of transportation from the ferry to the bridge, whereby their property and the profits of their business were rendered almost worthless, laying damages at five hundred thousand dollars. They claimed, also, that the bridge was built on a portion of their land without their consent, and without payment therefor but, produced no evidence to sustain this. The court below instructed the jury to find for the company.

Held, where the construction of a bridge will interpose no physical obstruction to the enjoyment of a ferry franchise across the same river, the owners of the ferry are not entitled to compensation for any incidental impairment of the profits of their ferry, resulting merely from the use of the bridge instead of the ferry by the public.

(1 Duvall, 135; 11 Peters, 420.) It can not be pretended that the laws of this State for establishing and regulating prices, contain any express provision prohibiting the erection of bridges across our rivers, however near may be the site of a bridge to the landing of a ferry; and, for obvious reasons of policy and necessity, no such prohibition should be raised by implication. Neither bridges nor ferries are authorized by legislative sanction for remunerative purposes to the owners only, but for the benefit of the public, whose interest is their first and paramount object, and in the absence of express law, the legislature should not be presumed to have intended to deprive itself of the power of promoting that object.

Judgment affirmed: Piatt et al vs. Covington and Cincinnati Bridge Co., 8 Bush (Kentucky) Reports.

MUNICIPAL.

1. *Liability of—Street obstructions—Notice.*—A municipal corporation is not liable for injuries caused to individuals by obstructions on the highway not placed there by its own officials, or by authority of the city government, until after actual notice of their existence, or until by reason of the lapse of time it should have had knowledge, and therefore actual notice may be presumed: *Hume vs. Mayor, &c., of New York*, 632, 47 N. Y.

2. *Police regulations—Wharfage.*—Where a city is authorized by its charter to establish and regulate the use of wharves, fix the rate of wharfage, and regulate the anchorage and moorings of boats and rafts, it possesses and may, by ordinance, exercise the incidental power of prohibiting any and all persons, including those owning lots abutting on the stream navigated, from using any place other than the wharf as established by the city authorities without permission of the city and payment of the ordinary wharfage fee: *City of Dubuque vs. Stout*, 80, 32 Iowa.

3. *Taxation.*—Where a city charter refers to a general law of the State for the subjects of taxation, any change in the general law in respect thereto works a corresponding change as regards the subjects of taxation by the city for municipal purposes: *Trackaberry & Co. vs. The City of Keokuk*, 155, 32 Iowa.

4. *Liability for failure to keep streets in repair.*—A municipal corporation is liable for damages caused by its neglect to keep its streets in proper repair: *Collins et ux. vs. The City of Council Bluffs*, 324, 32 Iowa.

5. *Accumulation of snow and ice on sidewalk.*—Suffering an accumulation of snow and ice on the sidewalk, whereby injury is caused

to an individual in consequence of a fall occasioned thereby, will render the city liable, in damages, for the injury sustained. The duty on the part of a city to repair its streets is not discretionary: *Ib.*

6. *Negligence in employment of Physician.*—To entitle a person thus injured to recover of the city the damages sustained, it is not necessary that he employed the best medical and surgical skill to be had in effecting a cure. If he used reasonable and ordinary care in the selection of a physician or surgeon it is sufficient: *Ib.*

7. *Damages.*—An instruction to the jury in such case, to the effect that if they found the injury to be of a permanent character they should consider that fact as an element in enhancing the damages, was held not erroneous, on the ground that under it the jury might take into consideration and allow for future sufferings of the plaintiff: *Collins et ux vs. The City of Council Bluffs*, 324, 32 Ioa.

8. *Excessive Damages.*—In an action against a city to recover for injuries caused to the plaintiff, a married woman, from a fall occasioned by ice accumulated on the sidewalk of a city, a verdict for \$15,000 was held not so excessive as to justify its disturbance: *Ib.*

9. *Bridges.*—A city is liable for lumber furnished to repair a bridge situated on a county road, but within the corporate limits of the city: *Tubbs vs. The City of Maquoketa*, 564: *Ib.*

10. *Streets—Contractor—In pari delictu.*—Where one contracts with a municipal corporation to keep any portion of its streets in repair, in consideration of a license to use them to his benefit in an especial manner, he, in effect, contracts to perform that duty to the public, in the place and stead of the municipality, which, by the acceptance of its charter, was imposed upon it, *i. e.* to keep its ways in repair, so that they may be safe for the passage of the public; and the contractor is liable for any damages which naturally and proximately fall upon the corporation in consequence of a defect in a street embraced in such a contract, injury results to one of the public, who recovers of the corporation his lawful damages, the latter can recover them over of the contractor. As between the parties to the contract, the corporation is not *in pari delictu*: *City of Brooklyn vs. B. C. R. Co.*, 475, 47 N. Y.

OUSTER.

Forfeiture—Breach of Condition.—To form a sufficient foundation for a judgment of ouster against a corporation for the forfeiture of a franchise, not originally usurped, but legally vested, because of the breach of a condition subsequent, the verdict must show the fact, not

merely of the breach of the letter of the subsequent condition, but of its intent and meaning, and must find such facts as the court may adjudge to amount to a substantial breach of the condition: *People vs. W. Turnpike and B. Co.*, 586, 47 N. Y.

1. *Injury to Sidewalk—Duty of City.*—In this case a fire destroyed ten or eleven houses, and injured the sidewalk in front of where the houses stood, and made it dangerous to walk on. Not more than eight or ten days after the fire the plaintiff below, in endeavoring to reach his own premises, fell on the damaged sidewalk and was injured:

Held, under the circumstances of this case, that the city was not guilty of negligence in not repairing the sidewalk in the brief period that intervened between the time of the fire and the accident: *City of Centralia vs. Joseph Krouse*, *Supreme Court of Illinois*, June Term, 1872.

2. *Time to Repair Sidewalk—Injury Result of Folly.*—That there could be no just complaint until a reasonable time should have elapsed in which the city could make or cause the property owners to make the necessary repairs, and there being a good sidewalk on the other side of the street, it was the duty of citizens to use it, and if parties would persist in passing over the damaged walk, notwithstanding their knowledge of its dangerous condition, and injury resulted, it could only be attributed to their own folly, and the law would afford no redress: *Ib.*

3. *Defect not Readily Discovered.*—That this is not like an injury occasioned by a defect in walks that could not be readily discovered, and where there is nothing to put one on his guard; that the appellee was fully advised of the dangers that he was about to encounter, and he deliberately assumed whatever of risk there was in the undertaking: *Ib.*

Digest of Recent State Reports on the Law of Negotiable Paper.

[From 43 Georgia; 8 Heiskell (Tenn.); 32 Iowa; 35 Maryland; 47 New York.]

ASSIGNMENT.

1. *Effects of order.*—An order drawn on the whole of a particular fund amounts to an equitable assignment thereof, and, after notice to the drawee, binds the funds in his hands in favor of the payee, as against an attaching creditor of the drawer: *McWilliams vs. Webb & Son*, 577, 32 Iowa.

2. *Administrator's to himself—Blank indorsement.*—Under letters of administration granted in the State of Virginia, the administrator became possessed, among other effects, of his intestate, a citizen of that State, of a bond or single bill executed by a citizen of Maryland, and indorsed in blank by the payee. The administrator charged himself, in his administration, with the amount of the bill and accounted therefor to his intestate's estate, which was sufficient to pay the debts of the deceased. The administrator instituted suit in Maryland against the obligor of the bill, and at bar assigned it to himself by writing over the blank indorsement. *Held*, That such assignment gave the plaintiff the right to maintain the action in his own name against the defendant; and unless it could be shown that whilst the bill was in the possession of the deceased, the defendant settled it, or made an agreement whereby he was released from its payment, the plaintiff was entitled to recover: *Lucas vs. Byrne*, 485, 35 Md.

3. *Idem.*—A single bill may pass by simple indorsement, from one to another, to an indefinite extent, and the last holder, in order to collect it, if *bona fide* entitled thereto, may fill up the blank indorsement at bar, and recover on same: *Ib.*

4. *Idem.*—If the holder of a single bill should die, and the bill should thus come into the possession of his administrator, he may transfer it to any other party, if indorsed in blank, by simple delivery, and that party may have the blank filled up; or the administrator may fill up the blank indorsement filled up to himself individually, and may institute suit in his own name, if there be no *mala fides*. But his right to sue may be repelled by showing that ac-

according to the law governing his administration he had no right to the single bill, nor entitled to assign or collect it in his individual capacity: *Ib.*

ATTACHMENT.

Rights of attaching creditor.—An attaching creditor can acquire no greater right in property attached than was held by the defendant at the time of the attachment. It is accordingly *Held*, Where two persons owned a promissory note jointly, and one of them sold and transferred his interest therein to the other, and suit thereon was, through inadvertence, commenced thereon in the name of both, and judgment rendered in their favor jointly, that creditor of the person who had sold and transferred his interest as before stated, acquired no interest by attaching the judgment: *Manny vs. Adams*, 165, 32 Iowa.

BANKS AND BANKING.

1. *Liability for neglect of duty.*—A bank receiving a promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged: *Ayrault vs. Pacific Bank*, 570, 47 N. Y.

2. *Notary agent of Bank—Usage.*—If the bank employs a notary to present the note, and to give the proper notices to charge the parties, the notary is the agent of the bank, and not of the depositor or owner of the paper. This general liability may be varied by express contract or by implication arising from general usage; but the practice or usage of banks, adopted for their own convenience in the transaction of their business, can not vary the contract between them and their dealers: *Ib.*

3. *Bill of Lading—Acceptance of Draft.*—The delivery of a bill of lading to a bank for the purpose of securing the payment of drafts drawn by the consignor upon the consignee and discounted by the bank, is sufficient to transfer the title to the property covered by the bill of lading, subject to be diverted only by acceptance of the draft: *Cayuga Co. Nat. Bank vs. Daniels*, 631, 47 N. Y.

4. *Special Deposit—Specific purpose.*—If, before the maturity of paper held by a bank against a depositor, an arrangement is made by which the bank agrees to hold the deposit for a specific purpose, and not to charge the note against it, the bank may be regarded as a trustee and the deposit special: *Nat. Bank of Fishkill vs. Speight*, 668, 47 N. Y.

5. *Indorser*.—In such a case, in the absence of fraud or collusion, an indorser upon such paper has no right to require the application of the deposit toward the payment of the paper upon its maturity: *Ib.*

6. *Property in paper received for collection*.—The property in business paper received for collection by one engaged in the business of banking and collection, and forwarded by him to his correspondent in the usual course of such business, without any express agreement in reference thereto, does not become vested in the correspondent, although he may have remitted upon general account, in anticipation of collections: *Dickerson vs. Wason*, 439; 47 N. Y.

7. *idem*.—It is only where by express contracts, or well established course of dealing, the correspondent becomes responsible for the collection, and can not seek re-imbursement of advances in case of the non-payment of the paper, that he can retain it or the proceeds of the collection, as against the real owner: *Ib.*

COLLATERAL SECURITY.

Holder's Right to Sue in his own Name.—When a note is placed in the hands of a party as collateral security, the holder thereof has the legal right to maintain a suit thereon in his own name, and to obtain judgment thereon, and if the debt which the note was placed in his hands to secure, is paid after the commencement of the suit on the note, but before judgment thereon, then, if the holder of the collateral note should collect the money due thereon, he would hold the same as a trustee for the benefit of those who are legally or equitably entitled to it: *Houser vs. Houser*, et al., 415, 43 Georgia.

CONSIDERATION.

1. *Defenses*.—A note payable "to the bearer, A.," is not a note payable to bearer, but a non-negotiable note, liable in the hands of the holder to any defense to which it would have been subject in the hands of the payee: *Warren vs. Scott*, 22, 32 Iowa.

2. *Consideration—Contract*.—S. A. & Co. were railroad contractors; A. was a sub-contractor of S. A. & Co. A. was indebted to M. & R., merchants with whom they had been, and desired to continue trading, in the sum of \$700. To secure a credit on the books of M. & R. in favor of A. as security for the past account and further advances, and without which M. & R. were unwilling to furnish further supplies to A., it was agreed that S. A. & Co. should accept a draft for \$1,000, to be drawn on them by A., in favor of M. & R., which was accordingly done. The amount of this acceptance was

not deducted by S. A. & Co. from the first estimates of work due from them to A., but, pursuant to their agreement, carried over, to be deducted from the next estimate. A short time after receiving the first estimate after the acceptance, A. absconded, leaving the work which he had undertaken to perform. Suit being afterward brought against S. A. & Co. on their acceptance, it was

Held, That the acceptance was not in the nature of accommodation paper; that it was supported by a sufficient consideration, and that plaintiff was entitled to recover the full amount of the draft, although it appeared that, at the time A. absconded, he was indebted to M. & R. to the amount only of \$700. The agreement of M. & R. to credit A. \$1,000 on their books, in consideration of the acceptance, made the consideration on their part complete: *The First National Bank of Washington vs. Snell, Aiken & Co.*, 158: *Ib.*

3. *Negotiability*.—Promissory note, the body of which was in the following form: "One year after date, for value received, I promise to pay A. S. Jones & Co., or bearer, the sum of \$100, with ten per cent. interest until paid. If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor." It was urged that the clause respecting the payment of attorney fees destroyed the negotiable character of the note, but the Court held otherwise: *Sperry vs. Horr*, 194, 32 Iowa.

4. *Notice of Latent Defects*.—To charge a holder for value before maturity of a promissory note, with a notice of latent defects, the evidence should be satisfactory: *Earhart vs. Gant & Gant*, 481, *Ib.*

5. *Misrepresentation of Agent—Partner*.—An alteration by the payees in a promissory note, inserting interest therein, made in good faith upon the false representations of their agent who obtained the note, to the effect that the makers authorized the insertion of interest in the event the payees were not satisfied without, will not estop the payees from recovering on the original consideration: *Krause vs. Meyer*, 566, 32 Iowa

6. Nor would the fact that the salary of the agent was in part paid by a commission on the profits of the sale constitute him a partner or change the rule above stated. Any evidence tending to show the good faith of the payees in making the alteration, is admissible: *Ib.*

INDORSER.

Joint-maker—Conclusion of Law.

1. When, to secure the payment of a sum of money loaned, the borrower gives his promissory note, payable to the order of the lender, and indorsed in blank by a third party, such third party is, by con-

clusion of law, liable as a joint-maker or original promisor, and in an action against him, to enforce this liability, evidence that he signed his name on the back of the note as indorser, at the request of the drawer, and for his benefit, is inadmissible, it not appearing that the plaintiff, the payee knew of such agreement, or in any way assented to it: *Ives vs. Bosley*, 262, 35 Md.

Payment—Extension of Time of

2. An agreement by the payee and holder of a promissory note, after its maturity, to allow the maker further time for its payment, being without consideration, is not a binding obligation upon either party, and does not operate to discharge an indorser of the note from his liability: *Ib.*

INSOLVENCY.

Liability of Indorser.

Where a note is indorsed "to be liable only in the second instance," the indorser is not liable, until the maker of the note has been sued to insolvency, or some legal excuse alleged for not having done so; but if it be alleged and proved that the maker is notoriously insolvent, and was so at the time of the indorsement, that would be a sufficient legal excuse for not suing the maker to ascertain that fact: *Pittman vs. Chisolm*, 442, 43 Ga.

JUDICIAL SALE.

Action—Parties.

1. A person who has transferred, by indorsement, promissory notes secured by mortgage on real estate, has, by virtue of his collateral liability as indorser thereon, such an interest in having the mortgaged premises sell for their fair value at foreclosure sale thereof, as will entitle him to maintain an action in equity to set aside such sale on the ground of irregularity or fraud when it appears that the premises were sold for less than their value: *Whitney vs. Armstrong*, 9, 32 Iowa.

Judgment Lien—Attachment.

2. Where lands of the defendant are attached, and judgment is afterward rendered against him in the proceeding, the lien of the judgment will take relation back to the lien of the attachment: *Hill vs. Baker, et al.*, 303, *Ib.*

NEGLIGENCE.

Fraud—Notice—Stolen Negotiable Paper.

The title of a purchaser for value of stolen negotiable paper, including bonds payable to bearer, is not impaired by negligence. It will only be defeated by proof of fraud or bad faith. Notice of

such facts as would put a prudent man upon his guard will not defeat a recovery therefor: *Welch vs. Sage*, 143, 47 N. Y.

PAYMENT.

The taking of a promissory note by the vendor of real estate for a part of the purchase money does not; in the absence of an express agreement to that effect, operate as a payment of so much of the purchase money: *Hurley vs. Hollyday*, 469, 35 Md.

PLEADING.

1. *Consideration of Indorsement—Sufficient Averment.*—In an action upon a promissory note brought by the payee against the indorser, the complaint alleged that the note was executed and indorsed as a condition of a loan by the payee to the makers, and as security for the payment thereof, and then set out the note, which, by its terms, was given "for value received;"

Held, That the averments were sufficient to authorize evidence of the indorser's privity with the negotiation, and if he indorsed with a knowledge that his name was required by the payee as a condition of making the loan, and as security for its payment, he was placed in the same condition to the payee as though it had been done by agreement; that the value received, expressed in the note, was a sufficient averment of consideration, which, by the other allegations, was shown to be the loan, and that these averments of making, execution and indorsement over were equivalent to an averment of delivery, and that, although to negotiate the note, plaintiff must become the first indorser, being privy to the transaction, and knowing the apparent relation was not the actual one, was liable: *Mayer vs. Hibsher*, 265, 47 N. Y.

2. *Averment Must be Specific.*—A declaration upon a written promise by the assignor of a note to pay it, with a recital that it has been put into a deed of trust of the maker, concluding: "If said deed satisfies the above note, then this obligation to be void," must contain an averment that the deed of trust has been foreclosed. An averment that the deed has failed to satisfy the note, is not good: *Hyde vs. Darden*, 515, 3 Heiskell, Tenn. Reports.

PRESENTMENT AND DEMAND.

1. *What Sufficient to Constitute.*—Where a note is made payable at a certain locality, without designation of a particular place therein, if the maker has no place of business or residence in the place where

it is in general made payable; if the holder of the note is within such locality on the day of payment with the note ready to receive payment, that is sufficient to constitute a presentment and demand: *Austin vs. Munro*, 360, 47 N. Y.

2. *Place of Oral Agreement.*—It is competent for all the parties to a note to agree orally that the note shall be payable at a particular place, so far as to make a demand of payment there sufficient to bind the indorser: *Ib.*

3. *Statute of Limitations.*—A promissory note, payable on demand, whether with or without interest, is due forthwith, and an action thereon, against the maker, is barred by the statute of limitations, if not brought within six years after its date: *Wheeler vs. Warner*, 519, 47 N. Y.

SURETY.

Consideration —Demurrer.—A surety to a promissory note pleaded that he had signed the same after it had been executed and delivered by the principals and accepted by the holder, and that there was no consideration to him for such promise;

Held, That the Court below committed no error in sustaining the demurrer to such plea, as it was insufficient in law to bar a recovery against him, without further alleging that there was no consideration moving from the holder to the original promisors for such contract of suretyship: *Gay vs. Mott*, 252, 43 Georgia.

Selected Digest of Recent State Reports and Decisions on the Law of Carriers.

[For the following Digest, selections have been made from 47 New York, and 32 Iowa; and from decisions by the Supreme Court of California, July Term, 1872; Supreme Court of Illinois, Oct. Term, 1872; Supreme Court of Mississippi, Nov. 1872; United States Circuit Court for the District of Iowa, Oct. Term, 1872; and Kankakee Circuit Court of Illinois, Dec. Term, 1872.]

BANKRUPTCY.

1. Liability of Railroad Company to be thrown into.—Held, That railroad companies are within the operation of the bankrupt act.

2. That a railroad company can not be proceeded against in bankruptcy for the mere suspension or non-payment, however long continued, of its commercial paper.

3. That an unexecuted agreement by a company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy.

4. That if stock owned by the company is disposed of by the authorized act of the corporation to creditors under circumstances to give them an illegal preference, no reason is perceived by the court why it would not be an act for which the corporation could be proceeded against under the bankrupt act: *L. C. Winter vs. The I. M. & N. P. R. R. Co.*, U. S. Cir. Court, Dist. of Iowa, Oct. Term, 1872.

CAUSE OF ACTION.

Plaintiff, a merchant in New York, received from N. and T., of Rochester, an order in writing for certain goods to be sent them "via canal." The goods were delivered to defendants, common carriers upon the canal, consigned to N. & T., pursuant to the order. The goods were lost *en route*. Held, That upon the delivery to the carrier, the title passed absolutely to the consignees, subject only to the right of stoppage *in transitu*, and that plaintiff, the consignor, could not maintain an action for their loss: *Krulder vs. Ellison*, 36, 47 N. Y.

CONSIGNOR AND CONSIGNEE.

1. Liability of intermediate consignee.—In the absence of a stipulation or condition in a contract of transportation, by which an intermediate consignee is to pay the freight, such consignee is not liable for the freight of goods sent to and received by him in the course of transit to forward the same to the ultimate consignee, when the agency is known to the carrier at the time of the delivery of the goods, and he delivers the same without making any claim for back freight, or giving notice that any claim or lien existed on his part: *Dart vs. Ensign*, 619, 47 N. Y.

2. *Idem*—Implied promise of intermediate consignee.—No promise by an intermediate consignee, who is not the owner of the goods, to pay the freight thereon, will be implied from a bill of lading consigning the goods to the care of such intermediate consignee for the owner at the place of ultimate destination: *Id.*

3. Title acquired by consignee—Intent of consignor.—Where property is delivered to a carrier upon consignment to a factor for sale, the consignee only acquires title thereto in case the shipment is accompanied by an unconditioned consignment in pursuance of an agreement to ship, thus showing that the delivery to the carrier was with intent to give the consignee a right of property, free from any condition whatever. An agreement to ship, although founded upon a good consideration, gives no title. An owner of property, therefore, who has made a prior agreement to consign the same, may, notwithstanding, impose any conditions upon the consignment he chooses, and the consignee can only acquire title thereto by performing the conditions: *Cayuga Nat. Bank vs. Daniels*, 631, 47 N. Y.

DAMAGES.

Measure of, in case common carrier negligently omits to transport within reasonable time, and market value falls.—In the absence of any special contract, the law implies an agreement upon the part of a common carrier to transport merchandise within a reasonable time. If he negligently omits so to do, and the market value of the merchandise falls, the measure of damages is the difference in its value at the time and place it ought to have been delivered and at the time of its actual delivery: *Ward vs. The N. Y. C. R. R. Co.*, 29, 47 N. Y.

EMINENT DOMAIN.

Where power is delegated by the legislature to the common council of a city, to authorize the laying of railroad tracks along or across

any of its streets, subject to the same claims and compensation for damages to the owners or lessees of adjoining property which is allowed under the general railroad laws, the common council has power to authorize the laying of a branch track from a private elevator across such streets to the track of a railroad, to be run by the railroad company for the transportation of grain, etc., to and from the elevator. It is not requisite that the ordinance giving the authority should provide for compensation, as that is provided for in the act: *Clarke vs. Blackmar*, 150, 47 N. Y.

EVIDENCE.

In an action against a railroad company for damages, defendants' counsel offered, in evidence, a newspaper account of the transaction, prepared from accounts received on the day and at the place of the accident. The author was examined as a witness, and testified he talked with plaintiff and others about it, and supposed he learnt from them, but had no distinct recollection of what was said, and could not tell from whom, principally, he received his information. Held, The article was properly excluded: *Downs vs. The N. Y. C. R. R. Co.*, 83, 47 N. Y.

LIABILITY.

1. Measure of diligence required of carriers by steam—Compliance of Congress requiring certain safeguards to be used.—The carrier of passengers, in conveyances and vehicles propelled by steam, is bound to use every precaution, which human skill, care and foresight can provide, and to exercise similar care and foresight in adopting new improvements, to secure additional protection: *Caldwell vs. N. J. S. Co.*, 282; *Ward vs. The N. Y. R. C. R. R. Co.*, 29, 47 N. Y.

2. *Idem.*—The fact that a carrier by steamboat has fully complied with the act of congress, as to the safeguards to be used for the protection of passengers, does not clear him from liability, or remove a presumption of negligence established by the evidence. His liability is not in any manner restricted or limited by that act, but a failure to comply with its provisions would, of itself, subject him to a charge of negligence: *Id.*

NEGLIGENCE.

1. Plaintiff, an infant twelve years of age, travelling with his mother upon defendant's cars, being unable to find a seat in the car with her, by her permission went into another, and there remained

until the train reached the station; when, in the effort to leave the car and return to his mother, he received an injury. Held, It was not *per se* a negligent act on the part of the mother to permit him to go from one car to another, under the circumstances: *Downs vs. The N. Y. C. R. R. Co.*, 83, 47 N. Y.

2. In an action to recover damages for causing the death of a child three years old, it appeared that the child killed was sent across defendant's track unattended save by a child nine and one half years old. Held, That this was not *per se* such negligence as would defeat a recovery: *Ihl vs. The 42d St. and G. St F. R. R. Co.*, 317, 47 N. Y.

3. If the deceased child exercised due care and the injury was caused solely by the negligence of defendant's driver, the defendant was liable, without regard to the question whether it was negligence in the parents to let the child go with so young an attendant: *Ib.*

4. Nor would negligence on the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attendant, absolve the defendant from liability: *Ib.*

5. A traveler upon the highway, in approaching a railroad crossing, is required to make a vigilant use of his eyes and ears, to ascertain if there is an approaching train; and if by such use of these faculties, *while approaching*, the vicinity of such a train may be discovered in time to avoid a collision; the omission to exercise them is such contributory negligence as will bar a recovery for an injury sustained by a collision: *Davis vs. N. Y. C. & H. R. R. Co.*, 400, 47 N. Y.

6. This rule does not require the traveller to stop, or if he is with a team, to get out and leave his vehicle and go to the track, or to stand up and go upon the track in that position, in order to obtain a better view: *Ib.*

POWER OF LEGISLATURE TO FIX THE RATES AT WHICH PASSENGERS SHALL BE TRANSPORTED ON RAILROADS.

1. Power of Company to Establish Rates.—That the charter of the company gives it the right to establish the rates of toll for the conveyance of persons, and that the railroad company can not be brought within the legitimate exercise of the police power vested in the legislature as to rates of toll until it can be shown that it has been unreasonable or extortionate in the use of its franchise in this regard, and that it is a question of reasonable charges on the one hand and of reasonable control on the other.

2. Power of Legislature.—That the legislature has no power to license a corporation to commit extortion in its charges.

3. The Charter a Contract.—The court considers the claim of the defendant that its charter gives it the right to establish rates of toll for the conveyance of persons, and that such charter is a contract, and within the protection of the provision of the Federal Constitution which declares that “No State shall pass any law impairing the obligations of contracts,” and that consequently its right to fix its tolls so granted can not be impaired by the last clause of sec. 12, art. 11 of the Constitution of 1870, which makes it the duty of the General Assembly to pass laws establishing reasonable maximum rates of charges for the transportation of passengers on the different railroads in this State, nor by the railroad act in question passed pursuant thereto.

4. The Charter a Contract.—That the charter being a contract, no law can be passed to lessen or impair any of the essential privileges conferred by the charter, and as our own court have expressed it, “any act of the legislature which repeals, materially impairs, or alters the rights of the corporators without their assent, would be in contravention of this constitutional provision.”

5. Nature of Corporation.—When a railroad corporation is to be regarded as a public and when as a private corporation.

6. Reasonableness a Judicial Question.—That whether charges are reasonable or the contrary is a judicial question.

7. Whether Act is Valid.—That whether this act is valid as against the defendant depends not upon the consideration that certain amounts are fixed as tolls, but upon the question whether it can be made to appear that the rates so fixed are reasonable, and that those fixed by the defendant are not so; for if these fixed by the defendant are not just and reasonable, there can be no justification for legislative interference.

8. The Conclusion on the Facts.—That the rate fixed in this case can not be adjudged *per se* extortionate, and until it is so made to appear the court can not perceive upon what ground the legislature can interfere: *S. R. Moore vs. The Ill. C. R. R. Co., Kankakee Circuit Court, Ill. Dec. Term, 1872.*

RAILROADS.

1. Plaintiff, a passenger upon defendants car, desiring to alight, passed out upon the platform and desired the conductor to stop the car, and refused to get out until the car had come to a full stop;

whereupon, and while the car was in motion, he threw her from the car with great violence out upon the pavement, whereby she was seriously injured. Held, That the act was a wanton and wilful trespass, not in the performance of any duty to, or of any act authorized by the defendant, and that defendant was not liable: *Isaacs vs. The 3rd Avenue R. R. Co.*, 122, 47 N. Y.

2. Where the conductor upon a railroad has been instructed by the company to demand of every passenger a certain fare, and to remove from the car any passenger refusing to pay the same; if the company has not the right to demand the required fare, it is liable for *any* force used upon the person of a passenger in an attempt to execute such order; if it has a right to the fare, and the conductor, acting in the performance of his duty, exceeds, through zeal, or impetuosity of temper, the degree of force necessary and proper to accomplish the purpose of removal, and injury results, the company is also liable: *Jackson vs. 2nd Ave. R. R. Co.*, 274: *Id.*

3. Waiver of Defects and Dangerous Customs—Contributory Negligence.—The rule recognized, that if an employee knows that another employee is habitually negligent, or that the materials with which he works are defective, and he continues his work without objection and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk and can not recover for an injury resulting therefrom: *Kroy, adm'x, vs. The Chicago R. I. & P. R. R. Co.*, 357, 32 Iowa.

4. Suit for Damages by Employee.—The defendant, a railroad company, contracted with the firm of McKeen, Smith & Co., to construct the road and its appurtenances. The superintendent of buildings, employed by the firm, hired the plaintiff to work upon a freight house. A poisonous mixture, in which corrosive sublimate was an ingredient, was applied to the timber to prevent decay, and the plaintiff was injured by breathing the exhalations of this substance, and by handling the timber to which it had been applied. He brought this suit against the railroad company to recover damages for such injury. Held, That he could not recover: *West vs. St. L., V. & T. H. R. R. Co.*, Supreme Court of Ill., Oct. Term, 1872.

5. When Company not Liable for acts of Contractor.—The court after stating cases in which railroad companies will and will not be held liable for the acts of their contractors and servants, say the company may be held liable when the person doing the wrongful act is the servant of the company, and acting under its direction; and though such person is not a servant as between himself and the com-

pany, but merely a contractor or lessee, still he must be regarded as a servant or agent, when he is exercising some chartered privilege or power of the company with its assent, which he could not have exercised independently of such charter. In other words, a company seeking and accepting a special charter, must take the responsibility of seeing that no wrong is done through its chartered powers, by persons to whom it has permitted their exercise: *Ib.*

6. Liability of employees—Knowledge of passenger in regard to unsafe condition of boiler.—A company of passenger carriers ran a steamboat and railroad line as one management, connecting S. and P. B. lived at P., and kept a bar on the boat, renting it with right to state-room, and meals on board. In addition, he was agent for an express company carrying over the same route, and received salary therefor; the express company paying the carrier company for the privilege of the route, and to carry its messengers and agents. B. coming on the cars at P., the locomotive exploded while under charge of the company's engineer, and B. was injured. Hence his action, his judgment, and the company's appeal: *Yeoman vs Contra Costa Steam Navigation Co.* Supreme Court of California, July term, 1872.

7. Held, B. was in no sense an employee of the carrier company; the business of selling liquors at the bar, was distinct from the business of the carrier. B. rented of the company, and was not employed by it. As messenger for the express company, he was an ordinary passenger. Hence, the rule or the assumption of risk by one employee, as against the negligent acts of a co-employee, and the absence of liability of the employer, does not apply. The rule referred to, though well settled, and not to be overthrown, is open to grave objections, and should not be extended beyond the limit fixed for it, by the current of decisions: *Ib.*

8. As between a passenger and a common carrier, proof of the occurrence of an accident, without fault of the passenger, is *prima facie* proof of negligence on the part of the carrier: *Ib.*

9. Though a passenger may know that the boiler of a steamer or locomotive is unsafe, or that the engineer is incompetent or careless, yet he may be willing from motives of necessity or interest to encounter the risk of travel; and such knowledge does not absolve the carrier from liability for damages resulting from the negligence of the engineer, or the insufficiency of the boiler: *Ib.*

10. Rights of owners of cattle—Diligence required of railroads to prevent injury to cattle—Principle of rate of speed.—Owners of cat-

tle may permit them to run at large and depasture on uninclosed lands, whether of railroad companies or other owners, and do not thereby incur any responsibility as trespassers. The owner of cattle can not be held as a trespasser for his cattle entering a close, unless they have broken a fence deemed in law sufficient to exclude them. *N. O. J. & G. N. R. R. Co. vs. Field*, Supreme Court of Miss.—Nov., 1872.

11. Railroad companies, like other proprietors, are not bound to inclose their lands to keep off cattle. They are to be considered as proprietors of property, using it for their private gain, but not to be permitted so to use it as to harm or injure others unnecessarily, or if to be avoided: *Ib.*

12. It is incumbent on them to employ skillful and prudent agents to guide and control the powerful forces they employ with vigilance, prudence and care, so as not to endanger the lives and property of others. They must use their locomotives with such care and diligence upon the road as would be exercised by a skilful, prudent and discreet person, regarding his duty to the company, and having a proper desire to avoid injury to property along the road, and liable to be exposed to danger: *Ib.*

13. Persons living contiguous to railroads have the same right as others in more remote localities to turn their cattle upon the range. But they assume the risk of their greater exposure to danger: *Ib.*

14. The only justification to a railroad company for injury to cattle upon its track is that, in the prosecution of its ordinary and lawful business, the act could not be avoided by the use of such care, prudence and skill as a discreet man would put forth to prevent or avoid it: *Ib.*

15. The rate of speed which may be adopted on a railroad, depends on the condition of the road, the usage of railroads generally, and the amount of property and passengers offering for transportation. The principle is that the rate of speed must be such as is consistent with the safety of the property and passengers in their care. Whatever rate may be adopted, there must be no relaxation of efforts to protect cattle from injury. If the convenience and business of the public demand a rapid transportation, railroads are not restrained from meeting the requirements because the danger to stock is greater from a fast train than a slow one: *Ib.*

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[APPELLATE SERIES.]

CONSENSUAL MARRIAGE BY DECLARATION.

A written declaration of marriage *de presenti* signed by both parties and delivered by the man to the woman, conclusively establishes the contract.

Proof of Signature to the declaration.—Circumstances under which it was held that direct proof of the wife's signature to the declaration was unnecessary, she possessing the document, and suing upon the faith of it for a declarator of marriage.

Promise Subsequente Copula.—The declaration might be regarded as a promise which when followed but not preceded by *copula* constitutes marriage: *Foster vs. Foster*, Scotch Appeals, 244.

DETINUE.

Where a deed of composition with creditors has been executed, under the terms of which certain persons, constituted trustees under the deed, are in possession of the promissory notes given to satisfy the amount agreed on as the composition, such trustees are, as between the parties to the deed, stakeholders, and are not the servants or agents either of the persons who gave the notes or of the persons who, under the provisions of the deed, would be entitled to receive them.

If, therefore, the person who made the notes, and handed them over to the trustees to deal with them under the deed, should afterwards give notice to the trustees not to hand them over to a particular creditor, the creditor can not maintain *detinue* against such person, the notes not being in his possession either really or constructively: *Lat-ter vs. White*, E & I. Appeals, 578.

EJECTMENT.

The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant.

The presumption in such a case is that it did reach the tenant himself.

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.

Per The Lord Chancellor (Lord Hatherley):—The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it.

Per Lord Westbury:—Where there has been service of a notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger.

Per Lord Westbury:—But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all.

T. lived in a house where his two sons and his daughter also resided. T. was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shewn to have known its exact terms, though he was aware of its nature.

Held, that this was a service sufficient to entitle the landlord to maintain ejectment against the father: *Tanham vs. Nicholson*, E. & I. Appeals, 561

EVIDENCE.

The defendant, after the publication of a libel and before the action was brought, destroyed the letter containing the libellous words:

Held, that as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words, as otherwise the witnesses, and not the Court or jury, would be made the judges of what was a libel.

Before the declaration was filed the plaintiff gave notice of his intention to move for a rule for the production of the letter containing

the words of the libel as set out in the declaration. An affidavit in answer by the defendant stated that he, the defendant, had destroyed the letter, but made no objection to the terms of the alleged libel set out in the plaintiff's affidavit.

Held, that the plaintiff's affidavit being merely for the purpose of the production of the letter was not admissible as evidence to prove the words of the libel: *Rainy vs. Bravo*, Privy Council Appeals, 287.

FATHER'S POWER OF APPOINTMENT UNDER HIS MARRIAGE SETTLEMENT.

Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest.

Held, that he could not deal or negotiate with them in executing the power.

Per The Lord Chancellor:—A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilized country affords to children; and would not be permitted without the fullest evidence of an intention authorizing it.

Held, reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement,—such releases or discharges notwithstanding.

A power may be executed without any express reference to it.—Per Lord Chelmsford:—The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

Appointments *pro tanto*.—The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.

Per Lord Westbury:—Some of the learned Judges of the Court below seem to have thought that the power required an execution *uno flatu*, once for all. If that were so, no appointment to a child, though settled in life, could take place until all the other children, objects of the power, had attained maturity.

Special judgment.—Per Lord Westbury:—I am desirous that we should dispose of this case, so as not to leave any door ajar that may be pushed open for further litigation: *Cunninghame vs. Anstruther*, Scotch Appeals, 223.

SALE BY SAMPLE.

Privileges and Obligations of the Purchaser.—The purchaser of goods by sample ought to examine them without delay; and if he find that they are not conformable to the sample, he may reject them and rescind the contract, giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor.

Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor.

The purchaser is not entitled to hold by the contract and ask for other goods instead of those to which he objects.

Where in such a case certain purchasers had omitted to rescind the contract, and neither returned nor offered to return the goods, they were held liable for the price.

Per Lord Chelmsford:—As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them. In England, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he can not return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial; and if they are found not to correspond with the sample, he is then entitled to return them.

Per Lord Chelmsford:—In England, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser can not return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in Scotland, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect: *Couston vs. Chapman*, Scotch Appeals, 250.

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[EQUITY SERIES.]

ADVANCEMENT.

A testator gave to three of his sons, Thomas, John and Peter, legacies of £500 each, and to his daughter £200, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his said legacy of £500 without bringing such sums into hotchpot. The residue of his property he divided between his four sons, Charles, Thomas, John and Peter, and his daughter. The testator had advanced to Charles, at different periods before the date of his will, £500, £170 and £58, and to Thomas, after the date of his will, £500 and £380.

Held, that the advances to Charles should not be taken into account against him, but that the £500 to Thomas was a satisfaction of his legacy, and the £380, being advanced after the date of the will, must be deducted from his share of the residue: *In re Peacock's Estate*, V.-C. M 236.

ADMINISTRATION SUIT.

Proceeds of Testator's Estate in Court.—Specialty and Simple Contract Creditors—Devises and Executrixes—Right of Retainer.—

A testator died leaving a deficient estate, his wife and daughter being executrixes.

The wife having real estate settled on her for life, with a general power of appointment, had appointed it as collateral security for a mortgage debt of the testator. This debt had not been paid at the date of the decree.

Held, that the right of the widow as surety to be indemnified created a simple contract debt only, and did not entitle her to retain as against specialty creditors.

The daughter was absolutely entitled under a settlement, subject to the testator's life interest, to funds out of which the trustees had

power to advance £2,000 to the testator on his bond, which they did. They afterwards made large further advances to him on promissory notes.

Held, that the daughter had a right to retain as against specialty creditors the £2,000 and interest from testator's death, but not the subsequent advances.

The rule laid down in *Henderson vs. Dodds* (1) in regard to costs, followed: *Ferguson vs. Gibson*, 379, V.-C. W.

APPOINTMENT BY RESIDUARY GIFT.

By a settlement dated the 6th of January, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:

Held, That although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court had power in construing both instruments to consider the surrounding circumstances, which showed that the settlor never intended the settlement to be revoked by a prior will; and that consequently the will was not an execution of the power: *In re Ruding's Settlement*, V.-C. M., 266.

BANKERS' ACCOUNT.

A wife being executrix of her father, paid the moneys she received into a bank in her own name as such executrix. The husband, it was alleged, sometimes paid in money to this account, and the wife paid cheques to her husband's creditors. The account remained for six years, when the husband died, and the wife died shortly afterwards:

Held, That if the money, or any part of it belonged to the husband, he had shown an intention of making a gift of it to his wife, and it constituted part of her estate at the husband's death: *Lloyd vs. Pughe*, V.-C. M., 241.

CONSTRUCTION.

Deficiency of Personal Estate—Marshalling—Legacy and Real Estate—Court of Appeal—Erroneous Decision.—Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it.

A testator, after giving a pecuniary legacy, devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts:

Held, That the real estate was not bound to contribute rateably with the legacy to meet the deficiency. *Hensman vs. Freyer* (1) not followed: *Dugdale vs. Dugdale*, V.-C. M., 234.

CONSTRUCTION OF WILL.

Death of Original Legatee before Date of Will—Substitutionary Gift to Children.—A testator bequeathed to his sister Susan all the property he might die possessed of for life, and after her decease, he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the life-time of his sister Susan, the share which would have been theirs to be equally divided among their children:

Held, That the children of a brother who died fifteen years before the date of the will, were entitled to take the share of their deceased parent. *In re Potter's Trust* (2) followed: *Adams vs. Adams*, V.-C. M., 246.

CONSTRUCTION.

It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority—whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association: *Pickering vs. Stephenson*, V.-C. W., 322.

ESTATE FOR LIFE OR IN TAIL.

A testator devised a freehold estate to trustees upon trust to permit his son, G. A., and his assigns to receive the rents, issues, and profits during his life, and after his death upon trust to permit the first son of G. A. and the heirs male of his body to receive the rents, &c., during their respective lives severally and successively in tail male:

Held, That the first son of G. A. took an estate tail in the property, and not merely a life estate: *Hugo vs. Williams*, V.-C. M., 224.

EXECUTOR DE SON TORT.

A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the defendant, the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the defendant, who was "the only legal personal representative and also heir of the undisposed of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased:

Plea, That the defendant was not, nor had ever been, administratrix with will annexed, or legal personal representative of the deceased:

Held, That if the defendant was not administratrix, she was executrix *de son tort*, and the bill could be sustained. Plea ordered to stand for an answer, with liberty to except: *Rayner vs. Koehler*, V.-C. M., 262.

EXECUTOR TAKING BENEFICIALLY.

A testator appointed two of his sons executors, and gave various legacies, but made no residuary bequest. By a codicil he directed his two executors and three of his principal legatees to pay all expenses attending the proving of his will, and administration and winding up of his estate, in equal proportion, according to the nature of the property they derived under his will and codicil, it being his express desire that no part of such expenses should be borne by the residuary legatees, but that they should receive the residue free of all deductions for expenses:

Held, That the appointment of executors had no operation as to the beneficial disposition of the residue; and that being undisposed of by the will, the codicil left the matter in the same position, and there was an intestacy as to the residue: *Travers vs. Travers*, V.-C. M., 275.

HOSPITAL.

Gift by will to the Kent County Hospital. There being no hospital having precisely that name:

Held, That a general hospital must be presumed to have been intended, and the Kent County Ophthalmic Hospital could not take the legacy, and that it must be divided between two hospitals; viz: the Kent and Canterbury Hospital and the West Kent General Hospital, which together supplied the place of a general county hospital:

In re Alchin's Trusts; Ex parte Furley; Ex parte Earl Romney, V.-C. M. 230.

INFANTS.

Reversionary Interest—Scheme for Maintenance.—The Court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency: *DeWitte vs. Palin*, V.-C. M., 251

REMOTENESS.

Testator, by will made in 1821, after a gift of leaseholds to his daughter E., gave all the remainder of his property whatsoever to his wife D., the income to her for life, and at her death unto E., for her own benefit and her children, or one only child if she should have any (all that was given to E. being for her own benefit, and not to be subject to the debts, control, or disposition of any husband she might marry); but if E. should die without issue the leaseholds were to be enjoyed by D. for life, and at her death to his sister S. for her life, and at her death, together with all that was left to D. for her life, to be equally divided between all the grandchildren of S.

E. died without having had a child:

Held, That E. was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to D.'s life interest, and that the limitations over, if E. "should die without issue," were void for remoteness: *Fisher vs. Webster*, V.-C. B., 283.

RENEWABLE LEASEHOLDS.

In 1805 a lessee for lives, with proviso for renewal, charged the hereditaments (subject to his own life-interest in part) with £1,500, and, subject thereto, conveyed the premises in trust for his son, W. W. T., the testator in the cause. In 1811 W. W. T. settled the premises, subject to the life-interest in part, and as to the whole charged with the £1,500, on himself, his wife, and eldest son; and further charged the same with £2,000 for his younger children. In 1815, the tenant for life having died, W. W. T. executed deeds reciting (erroneously) that the whole of the £1,500 charges had been paid off, and taking from the trustee (in breach of trust) a conveyance of the hereditaments, to himself absolutely, freed from the £1,500 charges; but there was no evidence that this deed was ever

acted on. In 1818, the *cestuis que vie* having all died, W. W. T. obtained a renewal of the lease, but without prejudice to a question whether the lessee had not lost the right of compelling a renewal. In 1819 W. W. T. purchased the reversion in fee of the leaseholds, the latter not being merged. In 1858 W. W. T. was party to a deed whereby he recited that he had paid £1,200, part of the £1,500, but that when he did so, he did not intend that the same should sink into or be extinguished in the premises. In 1845 he appropriated the remaining £300 to himself as part of his share in the estate of the *cestui que trust* thereof, who had died. By his will, after reciting to the like effect, he devised the hereditaments comprised in the deed of 1805, subject to all such incumbrances as the same might at his decease be subject to, and from the payment of which he exonerated his personal estate, to his son T. T. absolutely, subject to a further charge.

W. W. T. died in 1859. T. T. entered into possession and disputed his liability to pay either the £1,500 or the £2,000, but paid interest up to 1869:

Held, That the charges paid off were kept alive for the benefit of W. W. T.'s personal estate;

Held, also, that the renewed lease of 1818 was subject to the charges;

Held, also, that the reversion in fee, purchased in 1819, was subject to the charges;

Held, further, that if the reversion had not been so charged, T. T. could not have availed himself of the devise without giving effect to the testator's intention.

W. W. T. having, in 1845, mortgaged the hereditaments comprised in the deed of 1805:

Held, That, if the above sums had been charged on the leasehold only, and not on the reversion, the mortgagees must have had recourse to the reversion first, on the principle of *Barnes vs. Racster* (1 Y. & C. Ch. 401.) *Trumper vs. Trumper*, V.-C. B., 295.

VOLUNTARY SETTLEMENT.

A voluntary settlement should contain a power of revocation; if it does not, the parties who rely upon it must prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the court sees, from the surrounding circumstances, that the settlor believed

the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settlor, interfere and give relief against it: *Hall vs. Hall*; V.-C. W., 365.

WIFE'S EQUITY TO A SETTLEMENT.

The plaintiff filed a bill to establish her equity to a settlement of £6,000, which accrued to her absolutely during her coverture. The husband, on the marriage, which took place in 1862, gave up an income of £100 a year at the desire of his wife, but he had no property and made no settlement. Subsequently to the marriage, sums amounting to £56,000 consols were settled by the wife's mother and relatives upon her for life for her separate use, with remainder as to £200 a year for her husband for life, and subject thereto for their children. From 1862 she allowed her husband £100 a year till 1865, when he left her, and they had not since resided together. In 1870 the wife agreed, under pressure of a suit by the husband for restitution of conjugal rights, to allow him £300 per annum. She had saved out of her income £1,000 a year for six years. There were two children, who were supported by the wife:

Held, That the wife being amply provided for, and there being no proof of misconduct on the part of the husband, the court would not interfere with his marital rights, and bill dismissed with costs: *Giacometti vs. Prodgers*, V.-C. M., 253.

WINDING UP.

Contributory—Director's Qualification.—Articles of association provided that no person should be capable of serving as a director unless at the time of his appointment he should hold twenty-five shares. On the 14th of February, 1867, the directors of the company were appointed, and at the same time it was resolved to allot twenty-five shares to each of the persons named as directors. A., one of these persons, had consented to act as director; but in ignorance, as he stated, that any shares had been allotted to him, and under the mistaken impression that the necessary qualification was twenty £25 shares, and not twenty-five £20 shares, applied on the 1st of March, 1867, for twenty shares, which were allotted to him. He attended meetings and continued to act as director until October, 1867, shortly after which the company was ordered to be wound up:

Held, That he was liable, not only for the twenty shares for which he had applied on the 1st of March, but also for the twenty-five which were allotted to him as his director's qualification, pursuant to

the articles of association, on the 14th of February, 1867: *In re* British and American Telegraph Co., *Fowler's Case*, V.-C. B., 316.

WILL.

Gift of Residue to Legatees named, and to their Executors, Administrators, and Assigns—Declaration that the Shares should be vested on Execution of Will—Death of Legatee before Testator—Lapse.—Testator gave, by will, the residue of his estate to trustees to pay and transfer the same unto seven legatees named, in equal shares as tenants in common, and their respective executors, administrators, and assigns, to whom he bequeathed the same accordingly; and he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women should be for their separate use:

Held, on demurrer, that the share of one of the legatees—a married woman—who died after the date of the will but before the testator, did not belong to her husband, her legal personal representative, but that it had lapsed: *Browne vs. Hope*, V.-C. W., 343.

Digest of English Law Reports for November, 1872.

[COMMON LAW SERIES.]

ARBITRATOR.

Broker made Referee to determine whether or not Goods are of the Quality contracted for.—The defendant, as broker, made a contract for the plaintiff, the seller, as follows: "Oct. 26, 1869. Sold by order and for account of Mr. D. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London @ 22s. per cwt.—D. pd.—Shipment November or December, 1869," &c.:

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the defendant was employed as a sort of arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision,—he having acted *bona fide* and to the best of his judgment: *Pappa vs. Rose*, C.P. (Ex. Ch.) 525.

BOTTOMRY.

Bond given to procure release of British Vessel under arrest at a Foreign Port not upheld.—In 1867 an English vessel, then at Monte Video, was chartered by W. to proceed with cargo to certain ports in South America. She took in the agreed cargo, and sailed according to orders, first to one and then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay and after notice to the consignee, sold it to defray expenses. The vessel, after having been several other voyages arrived at Buenos Ayres in 1868, and procured a charter to an English port. After this last-mentioned charter had been entered into, W. instituted legal proceedings at Buenos Ayres to recover damages

for the non-delivery of the cargo shipped by him, and caused the vessel to be arrested for the damages so claimed: The arrest was under process valid according to the law in force at Buenos Ayres. By the advice of the British consul at Buenos Ayres, the master agreed with W. to compromise the dispute by giving to W. a bottomry bond for a sum of money considerably less than the amount claimed by him. The bond was given, and the vessel was released.

In a suit instituted on behalf of W. and his partner in trade against the vessel after her safe arrival home to enforce the bond:

Held, That the circumstances under which the bond was given rendered it incapable of being enforced: *The Ida*, 542, A. & E.

COVENANT NOT TO ASSIGN.

Lease—Partners.—A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B.:

Held, A breach of the covenant: *Varley vs. Coppard*, C.P., 505.

INNKEEPER.

Lien on Goods belonging to third Person—What Goods subject to the Lien.—B. went to the defendant's hotel and took with him, as his own, a pianoforte which he had hired of plaintiff. B. having remained at the hotel several weeks left in debt for his board and lodging; and defendant claimed to detain the piano as against the plaintiff in exercise of his lien as innkeeper:

Held, That, as defendant had received the piano as part of the goods of his guest, he had a lien upon it: *Threfall vs. Borwick*, Q.B., 711.

MARINE INSURANCE.

Construction of Policy on Freight—"From B. Island to Port of Discharge, the Insurance on said Freight beginning from the loading of said Vessel."—The plaintiffs caused themselves to be insured with the defendants, "lost or not lost, in £500, upon the freight payable to them in respect of this present voyage to be performed by the vessel Napier from Baker's Island to a port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a re-insurance to be paid as on

original policy." The plaintiffs had underwritten a policy on chartered freight of a cargo of guano, from Baker's Island, while there, and thence to a port in England. The vessel arrived at Baker's Island, and had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. The plaintiffs, having paid upon a total loss, sought to recover it from defendants:

Held, That the risk had not attached.—By Blackburn, J., on the ground that the clause, "the insurance on the said freight beginning from the loading of the said vessel," did not extend the insurance beyond the other part, "from Baker's Island," but only shewed that defendants did not intend to be liable unless the goods were on board.—By Mellor and Lush, JJ., on the ground, that the later words did extend the previous clause and made the risk begin earlier, but that "from the loading" meant from the completion of the loading: *Jones vs. The Neptune Marine Insurance Company, Q.B., 702.*

SALVAGE.

Rights of Owners of Salving Vessel to Salvage Reward in a case where some of them were also Owners of the Vessel which occasioned the Mischief.—By the improper navigation of a steam-tug B., a vessel at anchor was sent adrift and placed in jeopardy. A steam-tug, W., rendered assistance to the drifting vessel:

Held, That the owners of the W. were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief: *The Glengaber, 534, A. & E.*

2. Services rendered on the High Seas by putting two of the Crew of a Ship on board a Vessel in distress for want of Hands—Right of Owners, Master, and Crew to participate in Salvage Reward.—A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men the ship was exposed to risk, and the remainder of her crew had to undergo extra labor:

Held, That not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered: *The Charles, 536, A. & E.*

WILL.

General Intent—Estate to be Enjoyed by one Person—"All and every other the Issue of my body"—"Other the Issue"—Words of exclusion or completion—"For default of such Issue."—A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue, to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born successively in tail male; and for default of such issue, to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue to his granddaughter E. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter J. for life, with remainder to her first and other sons successively in tail male; and for default of such issue to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth and other daughter or daughters of his son successively, and in remainder one after another and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body;" and for default of such issue, to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person, and should not be dispersed, and a provision that any female who inherited should with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:

Held, 1st, that the words "issue of my body" in the penultimate limitation were to be read in the same sense as "heirs of my body;" 2ndly, that, having regard to the whole will, that devise could not be read as giving the estate per capita in joint-tenancy to all who came within the class at the time the estates vested in possession; 3rdly, that the words "all and every" did not import that all were to take at the same time, but were satisfied by all taking in succession; and 4thly, (Bramwell, B., dissentiate,) that the word "other" was to be read not as a word of exclusion, but of completion; and that, upon these principles of construction, there was, by virtue of the penultimate limitation, a vested remainder at the death of the

testator in tail general to which his son then became entitled.—This remainder descended to F., who duly executed a disentailing deed. He devised the estate to the defendant's father, from whom it descended to the defendant. In actions of ejectment by persons claiming as issue of the body of the testator as joint tenants per capita at the time the estates vested in possession, by the heiress in tail general of the testator at the same period, by the heir of the survivor of all the issue of the testator living at his death (other than these included in the particular limitations), and by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:

Held, That the defendant was entitled to judgment.—Mandeville's Case (Co. Litt. 26 b) considered: *Allgood vs. Blake, Ex.*, 339.

Digest of Recent Unreported Decisions of the Supreme Court of Tennessee, April Term, 1872.

BILLS AND NOTES.

Due course of trade.—Dumont agreed with the defendants to build for them a boat according to certain specifications. At the same time he agreed with the plaintiffs for iron and other materials wanted for the construction of the boat, and in payment for these plaintiffs were to take notes of defendants, to be executed on the delivery of the boat. The boat was built, tried and delivered, and the notes executed and delivered to Dumont and by him to plaintiffs before due. After further trial alterations in the boat were found necessary arising out of departures from the original plan.

Held, that the cost of these should be set off against the notes in hands of the plaintiff: *Gaylord vs. M. & A. R. Packet Co.*

FACTOR.

1. Advances.—A factor who has made advances on goods is bound to sell if instructed, provided the sale if made will pay his advances. Otherwise he may exercise a discretion: *Blair vs. Child.*

2. A factor may pledge goods to the extent of the advances he has made upon them: *Ib.*

3. If he do so but reserve the same right to control the sale as he would have in the absence of the pledge he is held to the exercise of the same diligence and is under the same obligation to obey instructions as before: *Ib.*

FRAUDULENT CONVEYANCE.

1. A trust deed on a stock of liquors, &c., which permits the owner to use it in trade and sell and dispose of it as before is fraudulent and void: *Ebbert vs. Tenn. Nat. Bank.*

2. A deed fraudulent as to existing creditors is void as to subsequent creditors: *Ib.*

ILLEGAL CONTRACT.

1. Corporation—A note made upon a loan of money by the direction of a bank to a party for the purpose of enabling him to

make arms under a contract with the State of Tennessee, then fighting in aid of the Confederate cause, the stockholders and owners being mostly in the Federal lines and on the Federal side, may be recovered, it not appearing that the directors were actuated by the motive of giving aid to the Confederates: *Planters' Bank vs. Jones*.

2. To charge a corporation with illegal conduct there must be evidence of the illegal purpose in a corporate act not merely in the declarations of individual directors: *Ib.*

INNKEEPER.

1. Charge of Court—A charge which it seems probable is misstated in the bill of exceptions, must be read as found, though in contradiction to another part of the charge: *Greenwood vs. Robbins*.

2. A charge that if an innkeeper furnishes a guest with the proper appliances against robbery, such as locks, bolts, &c., of which the guest avails himself, the innkeeper is discharged, is erroneous, though the court charged also that the innkeeper was liable for any loss sustained unless from the act of God or public enemy or the neglect or fault of the guest: *Ib.*

INSURANCE.

1. An agent of an insurance company instructed only to deliver policies upon payment of cash part (3-5) of premium in cash, delivered policy and took note of E. J. B. whose life was insured. The policy acknowledged payment from plaintiff, wife of E. J. B. Another agent succeeding, took draft of E. J. B., which was not paid but surrendered, and a note taken of E. J. B. payable to the company, to bear eight per cent. interest, after maturity, until paid. This was never paid and E. J. B. expressed his inability to pay. Company reinsured for one half. Application provided that the policy should not be binding until the amount of premium had been received during life-time of the assured.

Held, 1st. That the agent was a general agent and the company was bound by his act.

2d. Admissions of E. J. B. after delivery of policy could not bind the wife.

3d. The company is estopped by the recital of payment, from denying the receipt so as to impeach the validity of the forfeiture.

4th. No subsequent contract of E. J. B. for surrender of the policy or for forfeiture on failure to pay his note or draft would affect the right of the wife.

2. A written application concluding with a stipulation that any untrue or fraudulent answers, or any suppression of facts in regard to the party's health will render the policy null and void, &c., does not operate as a warranty but a representation: *Booker vs. S. L. Ins. Co.*

3. The materiality of the statements will control their effect and only such as are material to the risk will have the effect if false to avoid the policy: *Ib.*

4. Where a forfeiture is insisted on it is necessary for the proof on which it is claimed to be clear and full, and affirmative: *Ib.*

5. Partnership.—The surviving partners of a firm have no claim upon the insurance money derived from the life policy of a deceased partner, who has paid the premium out of firm assets, charging the sum to himself on the firm books, and taking the policy for the benefit of a sister, not even a lien for amount taken to pay the premium: *Shelton vs. Parham.*

INTEREST.

On Master's Account—It is error to calculate interest from the date of the masters report to the time of the decree, on the sum found due by the report: *Champlin vs. Mm. & C. R. R.*

LEASE.

1. A lease for a year being about to expire the agent of the landlord notified the lessees that the rent would be \$5,000 per annum. The lessees said the rent was too high but did not say what they would do. They held over and paid one months rent then notifying the agent that they were willing to pay at that rate by the month until they could vacate the premises. The agent did not accept or refuse the proposition but said he would see his principal. After holding another month, the lessees vacated, paying the rent for that month. Court below charged that an acceptance of the rent by the lessor was an acceptance of the terms on which the rent was offered. Held error.

The holding over by the tenant after notice was an acceptance by the lessees of the terms proposed. The subsequent acceptance of the rent for the month with the application to change the terms did not make a new contract: *Brinkley vs. Wolcott.*

2. A proposition being made by the lessees to lease at \$4,000 a year or at the rate of \$5,000 per annum with the right to quit at sure, if it could be accepted by silence, would still be an incom-

plete contract until it was ascertained which alternative was accepted. In this state of facts an acceptance of rent at the rate of \$5,000 per year would determine the question: *Ib.*

LIFE ESTATE AND REMAINDER.

A person having a life interest in personalty has a right to the possession of the fund upon giving bond and security for the forthcoming of the property on the termination of the life estate: *Blackwell vs. Taylor.*

MALICIOUS PROSECUTION.

1. Probable Cause—Judgment—Evidence of.—The judgment of a court of competent jurisdiction in favor of a plaintiff is *prima facie* evidence of probable cause, though reversed in a higher court: *Gayoso Gas Co. vs. Williamson.*

2. Such judgment as evidence of probable cause was subject to be rebutted by proof that it was obtained by fraud: *Ib.*

3. A statement in a declaration for malicious prosecution, that the defendant obtained an injunction in the Circuit Court of the United States, in a certain suit, which suit he continued to prosecute until the 18th Oct., 1869, when the injunction was dissolved by the Supreme Court of the United States, is impliedly an averment that the decision of the Inferior Court was in favor of the complainant therein: *Ibid.*

MOTION.

1. Notice—Certainty.—A notice of a motion against a revenue collector need not specify the day of the term on which the motion will be made: *State vs. Allison.*

2. Comptroller's Certificate.—The certificate of the Comptroller of the amount of revenue due from a collector to the State fixes conclusively the amount for which the court shall render judgment, but the judgment rendered is still subject to credits to be allowed by the Comptroller: Code, 732, 742.

3. A motion entered on a docket required by the rules of the court to be kept for that purpose, is a suit commenced: *Woodward vs. Alston*, 236.

NOTARY PUBLIC.

1. It is part of the official duty of a notary in this State to give notice of the dishonor of paper protested by him, and his failure to discharge this duty is a breach of his bond: *Wheeler vs. State for use of Tarwater.*

2. The admission or sworn statement of the notary is not evidence against his bondsmen: *Ib.*

PARTITION.

1. A sale for partition made upon report of the Master, that to insure its bringing anything like its value, the whole should be sold as it is not susceptible of being equally divided without detriment to the parties, is based upon proper grounds: *Freeman vs. Freeman.*

2. A tenant in common who is a minor, may, by next friend, file a bill for partition, or sale for partition: *Ib.*

3. Where one share of an estate is vested in an owner in fee, and the other in a tenant for life with remainder to her children, the existence of such remainder is no obstacle to a partition or sale at the suit of the owner of the present estate: *Ib.*

Parties.—After-born remaindermen are bound by a decree if the owner of the life estate, and all the remaindermen *in esse* at the time are parties: *Ib.*

5. Jurisdiction.—The courts of Law have concurrent jurisdiction with courts of equity in all cases of partition and sale for partition: *Ibid.*

PARTIES.

Who may Take Objection.—A corporation not possessing an exclusive privilege, has no right to object that another corporation exercising the same powers and privileges, is not authorized by its charter to occupy that locality: *Mem. Gayoso Gas Co. vs. Williamson, 139.*

PARTNERSHIP.

Real estate bought with partnership effects *prima facie* belongs to the firm, and on the death of the partner holding the legal title, will be divested out of his heirs and vested in the surviving partners, if needed for partnership purposes: *Provine vs. McLemore.*

RECORD.

1. Clerk—Costs.—A clerk will be allowed no costs where the transcript is badly made out: affected with "illegibility, omissions and transpositions": *Jones vs. Sharp.*

2. A transcript should not contain bonds, subpœnas, notices to take depositions, captions and certificates to depositions or other papers on which no question is made: *Ib.*

RENTS.

Rents of land go to the heir until sale of the property of the ancestor for his debts: *Boyd vs. Martin.*

SALE.

Stoppage in Transitu.—D. P., & Co. bought of G., A. P., at New Orleans, a bill of groceries, which they directed to be shipped in the name of D., P. & Co. to A., R. & Co., Memphis, and to send the bill to D., P. & Co. This was done, and the bill of lading taken in the name of D., P. & Co. The bill was presented on the day after sale, but not paid, D., P. & Co. having failed. On arrival of the goods at Memphis, and before the goods or bill of lading reached A., R. & Co., G. & P. replevied. D., P. & Co. had money of A., R. & Co., but how much does not appear:

Held, That G. & P. had no right of stoppage *in transitu*: Treadwell *vs.* Aydtlett.

WILL.

1. Constraction.—A devise of *lands* to a wife and daughter to be divided equally, the part given to the daughter being “given to her for her sole and separate use, and * * to be held by her *during her lifetime* free from all debts,” &c., of husband, “and after death, to be divided amongst such children of her’s as may then be living,” conveys an absolute estate in the event the daughter dies without issue, and she may dispose of it by will or deed: Price *vs.* Green.

2. The words “I do at my death lend to A. and the issues of his body a tract of land, &c.,” give to A. a fee simple in the land: Wynne *vs.* Wynne.

Digest of Recent Decisions of the Supreme Court of Wisconsin.

JUNE TERM, 1872.

Indictment for Murder—Conviction of Manslaughter—New Trial—Cannot be convicted of a higher Crime than Manslaughter.

1. Where upon an indictment for murder, the defendant was found "not guilty of murder, but guilty of manslaughter in the second degree, and is granted a new trial, such new trial must be held to relate only to the question whether he is guilty of manslaughter in the second degree, and he cannot therein be convicted of any higher crime.—(Opinion by Cole, J.,)—*State vs. Martin*.

2. By asking for such new trial, the accused does not, as to the higher crime of which he is acquitted, waive the protection of the constitutional provision that he shall not for the same offense be twice put in jeopardy of punishment.—*Ib*.

3. Whether, upon the second trial, there should be another arraignment of the accused, is not here decided.—*Ib*.

4. But where there is no new arraignment, the fact that the accused has not pleaded the former acquittal in bar cannot deprive him of the benefit of the aforesaid constitutional provision.—*Ib*.

DYING DECLARATIONS.

5. Where the dying declarations of the person whom defendant is charged with killing, as to the circumstances of the killing, were in part dictated to a justice of the peace by a third person, but the material part was taken from the dying person himself by the justice, and the whole, as written down by the justice, was read over to the deceased and assented to by him (he being aware of his condition), and the part thus taken directly from his lips was alone read to the jury, against defendant's general objection to its competency, without any demand that the whole should be read, if any. *Held*,

(1.) That the declarations were competent evidence.

(2.) That perhaps the whole thereof should have been read together, had the accused demanded it.

(3.) That, in the absence of such demand, there was no error in reading, only the part actually read.—*Ib.*

THE RIGHT OF SELF-DEFENSE.

(6.) The homicide having occurred in defendant's dwelling house, it was not error to instruct the jury that, if the deceased was lawfully in said house, having entered peaceably for the transaction of business, and had not been ordered to leave before the beginning of the affray, and if the affray was wholly personal between him and defendant, and did not involve any violence or attempted or intended violence to the dwelling or property or family, then defendant could be justified only under the same circumstances that would justify him had the affray occurred elsewhere, except that, if attacked, he was not obliged to retreat, but might stand his ground and defend himself with all necessary force, even to the extent of taking life, if that was necessary to protect him from great personal injury.—*Ib.*

(7.) Nor was it error to instruct the jury further, that to render the killing justifiable, they must find that defendant had been attacked, or was menaced with an immediate attack, by the accused; that the appearances of the attack made or threatened were such as to give him reasonable ground to apprehend a design to do him some great personal injury, and reasonable cause to believe that there was imminent danger of such design being accomplished.—*Ib.*

8. Nor was it error to further instruct the jury, that if the deceased only intended an assault and battery upon the defendant, or intended to engage in a personal encounter with him, and did not intend any personal violence upon him, unless defendant voluntarily chose to engage in such encounter, but nevertheless defendant sprang after deceased, and, without further provocation, stabbed and killed him, then such killing was a criminal homicide; and that "mere words, however violent, unaccompanied by overt acts, could never furnish a justifiable cause for an attack.—*Ib.*

9. It is not error, in such a case, to refuse correct instructions asked by defendant, where the jury are correctly and fully instructed on the same points in the general charge.—*Ib.*

DESCRIPTION—SURPLUSAGE.

1. The complaint in ejectment was entitled "County Court, Milwaukee County," and describes the land as situate in "township No. 7 north, of range 22 west, in said county." There is no range 22 west in said county, but the word *west* is a clerical error for *east*.

Held, that this word may be regarded as surplusage, and the remaining words show what range is meant, and that the land is within the jurisdiction of the court.—(Opinion by Cole, J.)—*Du Pont vs. Davis*.

2. The boundaries of said land are described as “commencing in the east line” of a specified quarter section, at a specified distance from the N. E. corner, “running thence south along said east line of said quarter section to the centre line of Clybourne street produced across said quarter section, thence along the centre line of Clybourne street,” a specified distance, “thence north to a point due west of the place of beginning, thence to the place of beginning.” *Held*, that the description is sufficiently certain, although “there is no such street as Clybourne intersecting the *east* line of said quarter section, and it is not stated whether Clybourne street, as produced, is to be produced east or west, north or south.”—*Ib.*

ADMISSION OF TITLE.

3. The answer claimed title in defendant under one C., and alleged that C. entered into possession of the premises, on &c., under claim of title, exclusive of any other right, founding such claim upon a deed from one P. and wife, of the same date, *as being a conveyance of the premises*; and that defendant and his grantor had been in possession adversely to plaintiff for the period limited by the statute. *Held*, that this was an admission of P.’s title, and it was sufficient for plaintiff to make proof that he had succeeded to P.’s rights, without showing title in the latter.—*Ib.*

DESCRIPTION OF PREMISES.

4. In the description of the premises in a deed the courses and distances expressed must yield to fixed monuments and natural objects. *Gove vs. White*, 20 Wis., 425.

5. Thus, where one boundary of the lot conveyed is the Menominee river, and the others can be determined by references in the description to corners and lines fixed by the government survey, calls inconsistent therewith for distances on some of the boundary lines may be disregarded.—*Ib.*

HEARSAY EVIDENCE OF DEATH.

6. Hearsay information of the death of a person, derived from immediate family may be admitted as *prima facie* evidence of the fact.—*Ib.*

JOINT TENANTS—RIGHTS OF SURVIVORS.

7. Where plaintiff in ejectment and his brother had been joint

tenants of the land in dispute, by virtue of a deed to them, and a witness in the action testified that he understood, from information received from members of the family, that said brother was killed at a certain time, before the commencement of the action, this was evidence sufficient to go to the jury that the joint tenancy had ceased and plaintiff had taken the whole estate as survivor.

8. Whether an objection to the non joinder of the co-tenant was waived by a failure to take it in the answer, is not here decided.—*Ib.*

TAX DEED—STATUTE OF LIMITATIONS.

Where defendant in ejectment claims under a tax deed, it is not an abuse of discretion to deny him leave to amend his answer so as to set up the *statute of limitations* in support of the deed.—(Opinion by Cole, J.)—*Eldred vs. Oconto County*.

REPLEVIN—PLEADING IN.

Where the complaint in replevin alleged that plaintiff was the owner and lawfully entitled to the possession, the answer, after a general denial, averred the defendant legally detained the property as pound master, and had a lien upon it for a certain sum, the jury found that plaintiff was not lawfully entitled to the possession, and that defendant did not unlawfully detain, but was entitled to the possession, and they assessed the value. *Held*, that the verdict was fatally defective in not finding who was the general owner, and what was the value of defendant's special property.—(Opinion by Cole, J.)—*Warner vs. Hunt*.

2. Plaintiff having obtained possession on commencing the action, the judgment upon a proper verdict, in case a return could not be had, should be that defendant recover, *not* the full value of the chattel, but merely the value of his special property therein.—*Ib.*

PUBLIC LAND IN AID OF RAILROAD—ACT OF CONSTRUED.

1. An act of Congress, in 1856, (11 U. S. Stats. at Large, 20,) granted to the State the odd numbered sections of land within certain limits, to aid in constructing a railroad, and provided that the even-numbered sections should not be sold for less than double the minimum price of public lands (i. e. not less than \$2.50 per acre), and should not be subject to private entry until first offered at public sale at the increased price. The railroad not having been located as contemplated by said act, Congress subsequently, by joint resolution, provided that said even-numbered sections should thereafter "be sold at one dollar and twenty-five cents per acre." *Held*,

(1.) That the effect of this resolution was simply to restore said lands

to the general body of the public domain, and subject them to sale under the then existing general laws relating to the sale of public lands.

(2.) That said lands (although they had once been offered at public sale, under the previous act, at the minimum of \$2.50,) did not become subject, by such resolution, to private entry at \$1.25, until first offered at public sale at that reduced minimum.—(Opinion by Lyon, J.)—*Eldred vs. Sexton*.

CONSTRUCTION OF DEPARTMENT.

2. The construction which has always been given by the different executive departments of the Federal government to the laws providing for sales of the public domain, while it may not be absolutely binding upon the courts, is entitled to very great weight, and should not be overruled in any particular case unless clearly erroneous.—*Ib.*

PAYMENT OF RENT.

1. Under a general denial of a claim for rent, *payment of the whole or a part of the rent since the commencement of the action cannot be shown*; but such payment must be set up in a supplemental pleading by leave of court.—(Opinion by Lyon J.)—*Hawes vs. Woolcock*.

SUPPLEMENTAL PLEADING.

2. The judgment being reversed by reason of the admission of evidence of such payment under the general denial, and the cause being remanded, the court below may still grant leave to file a supplemental pleading setting up such payment.—*Ib.*

FOREIGN JUDGMENT.

3. Where the rent has been paid, not by the party here pleading it, but by one B., who was jointly liable with him therefor, and in consequence of the judgment of a foreign court in an action brought by said B. against the party here claiming such rent: *Held*, that it is not necessary to introduce in evidence an exemplified copy of the judgment in said suit of B., but the fact of payment may be shown by *parol*, the same as if it had been a *voluntary* payment by B.—*Ib.*

RECENT AMERICAN DECISIONS.

SUPREME COURT OF TENNESSEE.

[APRIL TERM, 1872.]

TENNESSEE NATIONAL BANK *vs.* C. H. EBBERT & CO., *et al.*

JAS. O. PIERCE, Sol. for Compl't.; FINLAY & VANCE, Sols. for Respondents.

FREEMAN, J.—The question presented in this case, is, whether the deed of trust by C. H. Ebbert & Co., to Pritchard, trustee, to secure payment of debts in said deed mentioned, is fraudulent and void as to creditors, by reason of the stipulations on its face?

The following are the stipulations of said deed relied on as making it void, or the substance of them: The conveyance was of a stock belonging to said firm, as liquor dealers in the city of Memphis, and conveys "all our stock in trade, appurtenances, fixtures thereto belonging, embracing all liquors of every kind and description, with all goods, wares and merchandise, with store fixtures, appurtenances and conveniences thereunto belonging, including all our book accounts of every kind, which were then in control of said firm, and such as are now contained in stores or parts of stores 342 and 344, Second street, Memphis, Tennessee, either therein or wherever to be found in said old place of business *or any new place, and the* old stock or any new stock of the original firm of C. H. Ebbert & Co.—(giving names of members of the firm)—composed of said present parties, with any new member or members, together with their lease or leases, stock, fixtures, &c., aforesaid, with their custom and good name, and each and every and all the aforesaid, &c." This conveyance was made to secure the sum of \$10,500, evidenced by seven promissory notes, the first three for \$2,000 each, due respectively at thirty days, sixty days, and three months; the other three for \$1,000 each, due respectively at four, five and six months after date; and the seventh note due at seven months for \$1,500—all bearing interest from date.

It was agreed if these notes were paid at maturity the deed was satisfied, and the trustee to re-convey the property to Ebbert & Co.

If they failed to pay the notes, or any one of them, at maturity, then the trustee was empowered to take the property conveyed, or any part of it, or all of it, into his possession and control, and sell it, after thirty days notice, for cash, and appropriate proceeds: first, to expenses of trust; second, to the satisfaction of the debts, or so much as remained unpaid, whether due or not, and the balance of said debts, if not paid by proceeds of sale, be subject to immediate suit; thirdly, the balance, if any, to be paid to Ebbert & Co. The parties also waive the necessity of giving a bond on the part of trustee, or filing an inventory of sale.

It was further provided, in said deed, "that C. H. Ebbert, now conducting and managing the liquor business aforesaid, and carrying on and having possession of the property, under the firm name of C. H. Ebbert & Co., may keep possession of the same, carry on said business—continue the business—with the express understanding that none of the fixtures, appurtenances, appendages and conveniences, and lease and license necessary for the carrying on the business, are to be disposed of, *unless* subject to the stipulations hereinbefore mentioned."

It was further agreed that C. H. Ebbert & Co. might collect the accounts due the firm, and make such necessary expenditures as should be necessary to carry on the business, and *those only*. It was further agreed, that, should any *new* member be taken into the firm, "the lien and trust was to remain in force, and be over the new firm and stock as aforesaid, until discharged." It was especially agreed that C. H. Ebbert & Co. might "replenish their stock from time to time as may be necessary to the proper and successful management and carrying on the business—subject to all the provisions of the trust, however;" and subject to the further provision, that if they fail to make proper application of the proceeds of sales or collections of accounts to the satisfaction of the said notes, or any matter in good faith, the trustee (Pritchard) was authorized immediately to take possession, and enforce the trust, on failure to pay the notes.

It may be assumed that there was no fraud in fact on the part of the beneficiaries in this trust, in its inception. The question then is, can such a conveyance be held valid by the rules and policy of the law, as being fraudulent in law—or, more properly, as in violation of sound policy, and the spirit of our statute of frauds, as well as the general principles of law against fraud, or conveyances that reserve a benefit either directly or indirectly to the vendor or conveyor, as against or to the prejudice of the rights of creditors.

The statute of 13 Elizabeth, against fraudulent conveyances, enacts in substance that, "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, &c., which are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder or defraud creditors, and others, of their just and lawful actions, &c., not only to the let or hindrance of the due course of law and justice, but also to the overthrow of all plain dealing, bargaining, &c., between man and man." Be it therefore declared, &c., "that all and every feoffment, &c., made to, or for, any intent or purpose before declared and expressed, shall be from henceforth deemed and taken only against the persons, &c., whose actions shall, or *might* be in any wise disturbed, &c., to be clearly and utterly void."

Our own statute of frauds of 1801, ch. 25, sec. 2, is in substance the same as that of 13th Elizabeth; and as given in the Code, section 1759, is as follows: "Every gift, grant, conveyance of lands, tenements, hereditaments, goods, or chattels, or any rent, common or profit out of the same, by writing or otherwise; and every bond, suit or judgment, or execution, had, or made and contrived, of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud *creditors* of their just and lawful actions, suits, debts, &c., shall be deemed and taken, only as against the person, his heirs, successors, executors, &c., whose debts, &c., by such guileful and covinous practices as aforesaid, *shall or might be in any wise disturbed*, hindered, delayed or defrauded, to be clearly and utterly void."

In "Twyne's case," the leading case under the statute of Elizabeth, it was said, "and because fraud and deceit abound in these days more than in former times, it was resolved in this case, by the whole court, that all statutes against fraud should be liberally and beneficially expounded to suppress the fraud." And as quoted by Chief Justice Gibson, in the case of *Dowrick vs. Reichenback*, 10 Searg't. & R., p. 90: "These statutes of Elizabeth produce the most beneficial effects by placing parties under a disability to commit fraud, in requiring, for the characteristics of an honest act, such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the Judges, who, in accordance with the spirit, rather than the words, have engrafted on them such artificial presumptions and legal intendments, as are ordinarily subjects of judicial construction:" See *McKibben vs. Martin*, Am. Reports, vol. 3, 590. And such has

been the course of decision of the Courts of England and of this country up to the present period.

We do not deem it proper to go into a review of the numerous cases cited by counsel on the question presented. In the case of *Doyle vs. Robert L. Smith*, 1 Cold., 20—a case having much resemblance to the present one—the Court say: “It is a settled rule of decision in such cases, that any provision which materially hinders and delays creditors in the assertion of their rights, especially when coupled with a reservation of any part of the property to the grantor in the deed, makes the whole void—no permanent, lasting or material benefit can be secured to him, without vitiating the whole conveyance.” And, we add, than any conveyance that puts the property of the debtor in the name of a third party, so far as the legal title goes, yet leaves it in his possession, and under his control, with the right to continue to use it in trade, sell and dispose of it, as before the conveyance, *lacks* the essential elements to sustain such a conveyance as against a creditor; that it shall be *bona fide*, and contain no reservation or benefit in favor of the grantor, as against the rights of his other creditors. In *Twyne’s case*, the elements of fraud were, that Pierce, the debtor and grantor of the property, “continued in possession of said goods, and some of them he sold; and he shored the sheep, and marked them with his own mark:” See *Smith’s L. Cases*, vol. 1, Case 1st.

In this deed, it is expressly stipulated, “that C. H. Ebbert, now conducting and managing the liquor business aforesaid, and carrying on and having possession of the property, under the firm name of C. H. Ebbert & Co., may keep possession of the same, and carry on said business—continue the business—with the express understanding, that none of the fixtures and appurtenances, appendages and conveniences, and lease and license, necessary for the carrying on the business, are to be disposed of, unless subject to the stipulations hereinbefore mentioned.

In other words, the said C. H. Ebbert & Co., by the partner, who was then engaged in transacting the business, should continue to sell and dispose of the stock of liquors, conveyed in the deed to Pritchard, the trustee, and as shown by other parts of the deed, purchase other stock; in a word, the firm was to continue the liquor business, themselves, as before the conveyance, except the legal title to the business should be in the name of the trustee. It is true, on failure to pay the notes, or any one of them at maturity, the trustee was empowered to take the property conveyed, or any part of it, or all

possession and control, and sell it, after thirty days' notice, and appropriate proceeds to the payment of the debts secured;" but until the first note fell due, or default made, the property could be sold by Ebbert & Co. at will—in fact, it was contemplated it should be sold by them, and the proceeds were at their disposal. If they or C. H. Ebbert chose to appropriate them faithfully to the debts secured, all very well; but if he chose not to do so, then he or the firm might keep every dollar of the proceeds for their own purposes, and there is no remedy against such appropriation. In the meantime, the stock of liquors is secured and protected from the demands of other creditors by being in the name of the trustee, of record—so far as legal title goes—yet, practically, is secured to the use and benefit of Ebbert & Co. just as before the conveyance; that is, to be used by them to carry on the business of liquor dealers, entirely unaffected by the conveyance to the trustee, so far as sale and disposition of the stock is concerned, the proceeds to be received by the same parties as before the conveyance, with a contract as found in the deed, to pay and discharge these debts; and on failure to do so, the right on the part of the trustee to take possession of what stock might be on hand, and sell, paying proceeds on the secured debts. Admitting that there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet, here are such facilities for fraud, contracted for on the face of the deed, that it must be held as wanting in legal good faith, on the plain principle that every reasonable man is presumed to intend the probable consequences of his own acts; and besides, there is clearly a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors. As to the first, in being able to keep their stock in trade covered up from execution or attacking creditors, while they continued to use the same in defiance of their demands for profit, with the means of appropriating the proceeds to their own use. On the other hand, if the business had been conducted without the deed of trust, at any day it was subject to the demands of creditors who might seek to enforce their debts. Such a conveyance we do not think can be permitted to stand, consistent with the letter or spirit of our statute of frauds, and the current of decisions in construction, and application of the same. Numerous cases are referred to by counsel in support of this view of the case—a number of which we have examined, and think they contain the sounder view of the question: See *Griswold vs. Sheldon*, 4 N. Y., 581; *Edgell vs. Hart*, 9 N. Y., 216; *Ford vs. Williams*, 13 N. Y., 583.

The reasoning of the Supreme Court of Ohio, in case of *Collins vs. Myers*, 16th Ohio R., 547, presents the questions raised in this case in a conclusive light. The Court say "a continuance of possession with a power of disposition and sale, either express or implied, is quite a different thing from mere retention of possession. The object of a mortgage is to obtain a security beyond a simple reliance on the honesty and ability of the debtor to pay, and to guard against the risk of all the property of the debtor being swept off by other creditors by fastening a specific lien upon that covered by the mortgage. Such a mortgage as this, then, is no security, so far as the debtor is concerned; and is of no benefit, *except as a ward* to keep off other creditors. To hold such a mortgage valid would enable a debtor to do business upon a capital within the limits of the mortgage debt, at the will of the mortgagor, protected from all claims of other creditors, and in the present instance, upon an indefinite amount of capital, as the mortgage is to extend to all additions to be made to the stock in trade." The Court add "to hold such a mortgage valid would furnish a complete shelter, under which a man could carry on trade for his own benefit, completely protected against the payment of his debts, and placed beyond the reach of creditors."

In reference to the provision in this deed, that "C. H. Elbert & Co. may replenish their stock from time to time, as may be necessary to the proper and successful management and carrying on of the business," "subject to the provisions of this trust," we adopt the language of the case above quoted: "that in this case there is no specific lien, but a floating one, which attaches, swells and contracts as the stock in trade changes, increases and diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such a mortgage is no certain security upon specific property—all depends on the honesty and good faith of the debtor; and as he might dispose of it to a creditor at will, to satisfy a debt, we see no reason why a creditor might not seize it against his will for the same object:" *Ibid.*, 554.

It is insisted, however, that the additions to the stock become subject to the trust; and the provision that enables the trustee to take possession and sell all on hand on default, gives the trustee such control over the property conveyed as to meet the difficulty suggested. We can not assent to this: for, in the meantime, the debtor may have sold two-thirds, or even all the stock on hand—may have used the proceeds for his own benefit, and the trustee can only take pos-

session after the mischief is done by failure to appropriate to the debts secured by the deed of trust.

Without going further into the authorities presented in briefs, it suffices to say that we hold that the deed of trust in question can not be sustained, on the plain principle that it does hinder and delay creditors in enforcement of their claims—not by a *bona fide* appropriation of the property of the debtor to payment of his preferred creditor, which would be allowable—but by placing it in his own possession and control, with absolute power of disposition, and the means of using proceeds for his own benefit, as before conveyance; and that such stipulations are inconsistent, not only with the idea of a mortgage, but tend inevitably to give a fraudulent advantage to the debtor over his other creditors, while his property is protected by being in the name of a trustee.

Two cases have been referred to as holding a different view of the law from that expressed in the above opinion. The first, the case in third Cold. Rep'ts, 285. That case is, however, clearly distinguishable from this, in the fact that the trustee took immediate possession of the goods, and was to sell them for the benefit of the creditors. Here the assignor retains possession with power to sell and re-invest in other goods, and carry on the business as before the assignment, only he undertakes to pay the debts secured by the assignment. He was under obligations to pay these debts before, and the obligation was but little, if any stronger after making the deed.

The other case is that of *Hickman vs. Perrin et al.*, 6 Cold., 135, which was decided on the authority of a case in 7 Michigan Reports, 519, and of Hilliard on Mortgages, vol. 2, p. 402. The Judge who delivered the opinion in that case, puts the decision on the ground that the loan by Parkhurst, the first mortgagee, to the firm of Lewis, Perrin & Co. was *bona fide*, and the creditors appearing before the court were all subsequent in date to the making of the deed of assignment. We can not well see how the fact, that the creditors were subsequent creditors, could have any possible bearing on the question presented in that case, as to whether the deed was fraudulent or not, as nothing can be better settled than that a deed fraudulent as to existing creditors, under statute of 13 Eliz., is equally void as to subsequent creditors, though the rule may be different as to mere voluntary conveyances, under statute of 27 Eliz., and the fact of the creditor being precedent or subsequent may have application in such case. The argument of Judge Shackelford in that opinion, that "to hold that a merchant can not mortgage his goods without closing his

doors, would be to hold that no merchant could mortgage his stock," is one that we have been entirely unable to appreciate the force of. It would seem to us to be equally contrary to sound principle as well as sound policy, to hold that a merchant may transfer and convey his stock of goods so that the title will be in the assignee for the benefit of his creditors, and at the same time continue to carry on the business as if no such assignment had been made; in other words, we can see no reason why the title should be in one party by such an assignment, and the actual beneficial use in the assignor as before, and that such a transaction should be held good in case of a merchant, when in case of a farmer assigning his crop it would be held as conclusive evidence of fraud, and void. The rule we lay down in this case only requires that there be a *bona fide* and certain appropriation of the property for benefit of a creditor—not a colorable one in which the creditors have only a contingent interest, dependent on the good faith of the assignor, while the assignor himself has an equally certain interest secured to him; that is, he may carry on his business as before, and reap all its profits, subject only to the danger of having what he has not used for his own benefit, taken by trustee and sold, when it is ascertained he has so used it. We need not argue this question at length. It suffices to say that we see no necessity for adopting a rule in such cases that shall enable a merchant to assign his property to a trustee for benefit of his creditors, and at the same time continue his business and his doors unclosed, as seems to have been the idea of Judge Shackleford in the above opinion. We simply disapprove of the principle of the case, and overrule it, so far as it conflicts with the views herein expressed. The result is that the decree of the Chancellor will be affirmed, defendants paying costs of court below, and of this court.

IN THE CHANCERY COURT AT MEMPHIS TENN.

D. R. COOK et al. vs. J. F. McKINNEY et al.

1. CHANCERY SALE.—Where, upon a sale by the Clerk and Master, the property is struck down to the highest and best bidder, and afterwards, and before any confirmation of the sale, another party, a stranger to the proceedings, advances the bid by petition, but before any acceptance of the advance, asks to withdraw the same, which request is opposed by the parties, Held, that such request will be refused, and the party making the advance held to his bid.

2. The doctrine of caveat emptor does not apply in this character of cases, and the purchaser is entitled to have a good title made him.

This bill was filed to foreclose a mortgage. On the 11th of Aug., 1870, a decree of foreclosure and sale was entered, directing a sale of the mortgaged premises to satisfy the indebtedness secured by the mortgage, which, at the time of the decree, was \$13,500 in round numbers. On the 5th day of Nov., 1870, the property was sold at public outcry by the Master, and struck off to D. R. Cook and S. A. Norton, two of the complainants, at the sum of \$7,425, who, in accordance with the terms of the sale, executed their notes, with security, to the Master, payable at 6, 12, 18 and 24 months. On the 31st of Dec., 1870, the Master filed his report of the sale.

Previous to any application for a confirmation of this report, and on the 21st day of April, 1871, G. Falls, a stranger to the record, filed his petition in the cause, reciting the sale, and the fact that the sale had not, as yet, been confirmed, "but that the same was still open and within the control of the Court;" stating further that this property was very valuable, worth largely more than the sum of \$7,425, and stating as follows: "Petitioner is willing, and hereby proposes to advance the aforesaid bid of complainant on said property to the sum of \$12,50, and he hereby tenders his notes for this amount, according to the terms of sale, viz: four notes, each for the sum of \$3,150,"—describing them, with security,—“and Petitioner respectfully asks that his bid for said property may be accepted, and that he may be substituted as the purchaser thereof in the room and stead of complainants Cook and Norton, as reported by the Clerk and Master, and that his notes may be substituted for their notes filed with the Clerk and Master for amount of their bid.”

The four notes of the Petitioner, with security, and duly stamped, were filed with the Petition.

Subsequently, the purchasers at the sale, Cook and Norton, by their solicitors, in open court, signified their assent to the substitution of the Petitioner, Falls, as prayed for in his petition; but no action was taken by the Court thereupon. The Petitioner after this, and very soon after, moved the Court for permission to withdraw his application, which was opposed by the Solicitors of Cook and Norton. This motion was not accompanied by any petition, and afterwards, and before any action had been taken by the Court in the matter, and on the 13th of July, 1871, the said Falls filed a formal petition, alleging that no action had as yet been taken upon his former petition, and no re-sale of the property decreed, and asking to be allowed to withdraw his bid upon such equitable terms, as to costs, as the Court might impose:—

Stating further, that, since the petition was filed, circumstances had so changed as to make it very inconvenient and embarrassing for him to carry out the purchase, and that he had also discovered that the property had been sold for taxes more than once, thus encumbering and beclouding the title; that the amount of taxes for which the property had been sold was about \$3,000; and stating his unwillingness to take property thus encumbered and beclouded; further, that he was informed "that there are some questions and difficulties about the title."

He asks to withdraw from his said bid, and have his notes returned to him; should this be refused, that a reference be made as to the title.

The Solicitors of Cook and Norton again appeared and opposed the motion.

Whether the proper practice be to make applications of this character by formal petition, or whether a simple motion is sufficient, is an immaterial inquiry in this particular case, as before the motion was made the purchasers at the sale had signified, by counsel in open court, their assent to the advance, and the opening of the biddings, as requested by the Petitioner.

This relieves this application of one embarrassing feature, amongst others, which attend it, namely: as to whether, before confirmation, upon a mere advance, without more, the amount will open the biddings,—a vexed question in Tennessee;¹ for, if the purchaser at the sale assents to it, certainly the biddings would, in all cases, be opened where a substantial advance was tendered.

This difficulty out of the way, the question presents itself:

Can the bid be withdrawn, the parties in interest opposing it, at a

¹Settled that it will,—since this opinion was delivered.

stage of the proceedings when there has been no action upon the part of the Court in relation to the application to advance the bid ?

So far as I know, this is an entirely new question in the Chancery Courts of Tennessee. The researches of counsel have not discovered any case in our reports presenting this question, or even so much as alluding to it ; nor have they discovered in the English Chancery reports, or works on the subject of Chancery Practice and Chancery Sales, any reference to an application of this character.

My own researches have been equally unsuccessful.

I am not aware that a case of this kind has arisen in any of the Chancery Courts of the State, and suppose there is no rule or practice applicable to a case of this precise character in any of our Chancery Courts.

I will have to be guided to my conclusions by such aid as may be afforded from the consideration of the nature and character of Chancery Sales, and of the practice of opening biddings before confirmation of such sales.

I have found but one case where an application to withdraw an advance bid was made. It is referred to by Sugden, in his work on Vendors.—1 vol., p. 99, sec. 25, note y. He refers to it as follows :

“ Upon an application to the Court by the person who opened the biddings for General Birch’s estate, to forfeit their deposit, which was resisted by the creditors for whose benefit the estate was sold, the Court held the purchasers to the bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.”

This case is referred to as a manuscript case ; the case of Sewell vs. Johnson, Bunb. 76, is also cited, but these reports are not accessible.

But here it is evident the advance had been accepted by the Court, and the biddings had been opened, although it seems pretty clear the re-sale had not been made.

It is urged in behalf of the application to withdraw the bid, that the advance bid has not been accepted by the Court, and the biddings have not been opened, and that, until this is done, it is but a mere *ex parte* proposition by the Petitioner, a stranger to the record, which he has the right to withdraw at any time before it is accepted by the Court ; and it is urged that a distinction exists between his attitude and that of the purchaser at the sale, because of the fact, that as to this latter, the Master accepts his bid, knocks down the property to him, and reports the facts to the Court ; and that, as the Master is the

representative of the Court, the bid has thus been accepted. How far this distinction is a sound one will be considered presently.

It may be, in this particular case, an advance of some \$5,000 having been offered, and the purchaser, who is also the mortgage creditor, having assented to the advance, that it became the duty of the Court to accept the advance bid; that to refuse would be such a gross abuse of discretion as would amount to error, of which the Petitioner could avail himself and compel the acceptance of his advance bid, and the opening of the biddings; especially where the parties in interest who were creditors, and a large portion of whose debts the sale, as reported, fails to satisfy, should unite, as they undoubtedly would, in urging such refusal as error. So that it is probable the Petitioner, under the exigencies of this particular case, would have the right to demand the acceptance of his bid and the power to enforce it. If so, it is difficult to see any very substantial difference in his attitude before the formal acceptance and after.

It would not be very satisfactory to say that the Court has no power under the exercise of a legal discretion to refuse this advance bid, and yet, because there has been no formal act of acceptance, to assert the right to withdraw it, although, if such formal assent had been given, such right might not exist. But be this as it may:

Upon the subject of Chancery Sales we have adopted the English, rather than the American practice.

It is well settled that while a purchase at chancery sale is entirely within the control of the Court until confirmation, and is but a mere proposition by the highest bidder to become the purchaser; so that there is, indeed, no contract of sale until confirmation; nevertheless, such highest bidder is not at liberty to withdraw, unless for cause shown.—*Childress vs. Hurt*, 2 Swan, p. 491. He can be compelled to complete the sale.—*Daniel*, Ch. Pr., 1279.

And the persons interested in compelling him to his purchase can have the report confirmed.—*Daniel*, Ch. Pr., 1279.

And therefore can force him to a compliance.—*Ibid*¹

It is not true that he is a purchaser before confirmation. He is simply a bidder; his being the last, highest and best bid. And this, in effect, is what the Master reports to the court.

It is true, our practice is to style him the purchaser, and the Mas-

¹When it is said in *Childress vs. Hurt*, 2 Swan, 490, that: "Until confirmation of the report, the purchaser is not compelled to complete his purchase," a reference to the authorities cited will show what is meant, is that the party seeking to compel him to comply must first have the report confirmed.

ter's Report usually designates him as such; and although the property at the sale under our practice, is knocked down to him as in auction sales, this formality is about the only similarity which exists between the two.

The true nature of the relation in which this person called the purchaser stands to the sale, will be seen by recurring to the practice in the English Chancery courts.

The Masters' clerk prepares a paper on which the biddings on the different lots are to be marked. This generally consists of a copy of the particulars of the sale, with spaces between each lot. The lots are successively put up, at a price offered by a person present; such person signing his name to the sum he offers, on the above paper. Each subsequent bidder must also sign his name to the sum he offers; until no person will advance on the last bidder, who is then declared the purchaser."—Daniel Ch. Pr., 1268.

This is a mere misnomer, however, and means that he is declared highest and best bidder; for until confirmation, he is in no sense a purchaser.

This highest bidder must, at his own expense, procure from the Master a report of his being the best bidder for the property.—Sugden on Vendors, vol. I., p. 59.¹ He must then, at his own expense, apply to the court to have the report confirmed.—*Ibid*.

He is not considered the purchaser until the report is confirmed.—Daniel Ch. Pr., 1273.

And in Anon. 2 Vesey, Jr., 355, Lord Loughbrough says that, as until confirmation, he is always liable to have the biddings opened, he cannot be considered a purchaser.—See also Sug. Vend., vol. I., p. 87.

So entirely is he considered a mere bidder, and not a purchaser, that before confirmation he cannot sell his bid to a stranger at an advance, and have him substituted, but the advance must be paid into court.—*Ibid*, p. 79 (q.) and 80 (p.)²

But this view is fully recognized in our own courts. The transaction before the Master is merely a bid obligatory upon the purchaser.—Wood & Abbot vs. Morgan, 4 Humph., 371. The court here say: "It is a bid; an offer by the purchaser; and if the court is satisfied with it, it is obligatory upon the parties making it."

¹And the report which he procures the Master to make is that he was the best bidder.—Daniel Ch. Pr., 1272.

²Nor is he liable for any loss to the property.—2 Daniel Pr., 1455; 2 Swan, 490.

It is not true that the Master has accepted his bid. He takes the bid as the highest, last and best bid; and under the English practice the bidder deposits his bid and procures a report of the facts.¹

Ours is substantially the same. The Master reports the facts to the court. The bidder deposits his money, or executes his notes, as the case may be; and the Master reports these facts also. It is a tender by the bidder to the court, through the Master, of his bid with the amount or notes, and he requests the court to accept his bid, which the court does by the confirmation of the report. Until then there is no acceptance of the bid.

The very theory of opening the biddings previous to confirmation, shows the sale is in abeyance; other bids may be offered, and the biddings kept open until the confirmation. Then the biddings close, and the highest bid is accepted by the court. It is true, it is not strictly analogous to the continued bidding before the auctioneer; to open the biddings, conditions are imposed of a certain amount of advance, &c.; but this does not affect its nature. The fact that the biddings *may* be opened, shows that the highest bid before the Master has not been accepted, it has only been reported for acceptance.

The theory of this system is, that there is a continued bidding for the property up to the time of confirmation. The bidding is conducted in one mode before the Master; in another mode before the court. Under the English system, it was a written application both before the Master and in court, stating the bid throughout. Under ours, the transaction before the Master is *ore tenus*, and the application in court to advance the bid is by petition, but this is all merely incidental; there is no substantial difference between them. The bidder at the Master's sale brings the fact that he has made a certain bid, and which on that occasion was the last, highest and best bid offered, to the attention of the court through the report of the Master; the advance bidder brings the fact that he offers the still higher bid to the attention of the court through his petition filed in the Master's office and addressed to the court.

Now, shall this highest bidder before the Master be incapacitated from withdrawing his bid before confirmation, or any action of the court upon his bid; and the advance bidder in court allowed to withdraw his before action by the court accepting it?

¹In *Morton, Smith & Co. vs. Selden*, 11 Humph., 280, Judge Green, speaking of the English practice, says: "The Master gives notice; receives the bids; and reports the highest bidder; and if his report be confirmed, the title is examined and the conveyance prepared," &c.

Does not the court see in the present case two bids: one before the Master for \$7,425; another, by petition in court, for \$12,500; neither of which has been acted upon?

Shall the court allow the latter to be withdrawn, while it is held that the former cannot be; and thus require the confirmation of the former, thereby causing a sacrifice of \$5,000 to the parties in interest?

No principle is perceived upon which such a distinction can be based.

The petitioner, Fall's, application to withdraw his bid will, therefore, be refused, no ground being shown which would be sufficient, if interposed by a purchaser at the sale, to relieve him from the bid made at the sale.

The vague statement in the petition, that since he filed his first petition, "circumstances have so changed as to make it very inconvenient and embarrassing for him to carry out the purchase," need not be considered, but the statement that the title is encumbered and beclouded by reason of the property having been sold for taxes, entitles him to a reference as to title. While a purchaser may not have the right to plead errors, irregularities and defects in the proceeding to relieve him, *Swan vs. Newman*, 3 Head, 288; *ex parte Kirkman*, *Ibid*, 517, still he is entitled to a good title. The doctrine of *caveat emptor* does not apply to this character of Chancery sales. A Chancery sale will be set aside for defect of title.—See *Read vs. Fite*, 8 Humph., 328; *Deaderick vs. Smith*, 6 Humph., 138; *Morton vs. Sloan*, 11 Humph., 278.

Under the English practice "the solicitor of the purchaser, before he suffers his client to part with the purchase money, usually applies to the plaintiff's solicitor for an abstract of title to the lots purchased, which he may be compelled to deliver by order of the court."—Daniel Ch. Pr., 1273.

Under our practice, if doubts are stated as to title, and the court has reason to think there may be grounds of apprehension, a reference should be made to clear up any doubts as to title. And a reference should be made even before confirmation, where it is sought as here, to hold the party to his bid. If there are difficulties in the way of the title which can be removed, the court will have them removed, and will not release the bidder. Whether the \$3,000 taxes on the property can be abated from the purchase money, or the purchaser takes the property *cum onere*, is a question which will not now be determined.

A reference as to the title, and as to the amount and character of encumbrances because of taxes will be ordered; the clerk will report to the next term, and to the earliest day of the term practicable. If the title is found good, or capable of being made so, a re-sale will be ordered, starting the property at the \$12,500 as a minimum, (*Childress vs. Hurt*, 2 Swan, 493,) and if no higher bid is made, the purchase will be confirmed to the petitioner Falls, at his bid of \$12,500. The notes will be, in the meantime, filed in the Master's office.

W. L. SCOTT, Chancellor.

BENCH AND BAR.

On the 29th of last Nov. Hon. Wm. F. Cooper assumed the duties of Chancellor for the Nashville District, and upon taking the Bench delivered an address to the Bar from which we extract the following as likely to interest our readers everywhere:

As soon as I begin the active discharge of my functions, it will become my duty to decide every litigated case, and every contested question presented, against one of you. I know, from practical experience, how difficult it often is to prevent the feeling of disappointment of the moment from influencing our permanent judgment. However high may be our opinion of the ability and integrity of a Judge, it is apt to be shaken, if, when we have thoroughly convinced ourselves, (as what good advocate does not in almost every case, even when it seemed hopeless at first,) that law and justice are with us, the judge should unfortunately think otherwise; especially if he thinks so, as he sometimes will, very emphatically. I know no way to escape entirely this trait of our common nature, but we may soften its effect by being forewarned. Let us look leniently at each other's faults by striving, when a hitch occurs, to put ourselves in each other's positions for the time being. Occasional collisions are inevitable. The lawyer, warm from his view of the wrongs and sufferings of his client, can not but feel some exasperation at the coolness with which the Judge listens to their detail, and the pitiless impartiality which it is his duty to maintain. Let us mentally promise each other to try to guard against any unnecessary heat. If, occasionally, in the zeal for your clients, you should show more ardor than discretion, I shall try to bear in mind that I have been along there myself, and have often, no doubt, tried the temper of the incumbent of the Bench. On the other hand, if, in the impulse of the moment, I should show any of the impatience or petulance which too often accompanies official position, I trust you will reflect that it may be your fate, some time or other, to be placed in the same predicament, and that you will be indulgent.

The surest safeguard to a good understanding between the Bench and Bar, and of thoroughly appreciating each other, is for each to strive to master the law and the facts of the case. Most of the dif-

ferences of opinion in this world grow out of a misunderstanding of each other's meaning. There has been a loose and indefinite use of words on a vague and general view of facts. We do not always affix the same meaning to the same words, and we do often use different words in the same sense. To bring the parties together it is only necessary that each should understand the subject of dispute more thoroughly. Forensic discussions are no exception to the general rule. Nothing conduces to shorten them so much as accurate knowledge of the law and the facts. All cases, even the most complicated, can be reduced to a few points; are nearly always thus reduced by the final decision. The more thoroughly we master the case, the fewer, as a general rule, will be the controverted points. Most lawyers are, naturally enough, afraid to concede anything, because they have not sufficiently digested their case to see the result of the concession in all its bearings. There are few of us so gifted as the distinguished counsel, of whom I have heard Judge Emmons speak, who was in the habit of shortening the trial and the argument of causes in which he was engaged, by saying at once, when his adversary undertook to prove a point, that he agreed the fact was so, and when a point of law was made in argument, that he conceded it to be as claimed, until the controversy was narrowed down to the particular fact or principle of law upon which he intended to rest his client's rights. Such men are exceptional. But all of us may, by industry and attention, emulate his example to a certain extent. Let me earnestly urge the members of this Bar, and particularly its younger members, to come to the hearing of their causes well prepared. Do not trust your client's rights to accident, or the Judge alone. There may be a good Bar without a good Bench, but it is well nigh impossible to have a good Judge without the aid of a good Bar. In the multiplicity of questions of law and fact upon which a Chancellor is called to act where there is a crowded docket, it would be impossible for him to decide them correctly without the constant assistance of an intelligent and industrious Bar. Let me impress upon the younger lawyers, for the older ones have long since found it out, that because a man is a Judge, and older than you are, or even an abler lawyer, it does not follow that he can know everything, nor even always keep in his mind what he does know, nor avoid occasionally committing errors, and sometimes errors that a law student of six months standing ought not to commit. It is your duty to know the facts and the law of your case better than he can possibly do. His merit consists in fully appreciating your exposition of your case. If he does this,

and you are right, you win your case. If he does this, and you are wrong, he is able to satisfy you, perhaps, and, at any rate, the strictly impartial, wherein your error lies. You ought never to come to a hearing, not even of a motion, without previous examination, and, in most instances, a brief of the points of fact and law relied on. And this does not necessitate a lengthy argument. It requires only a brief in the proper sense of the term. And, let me add, the better you understand your case, the shorter will be your brief.

The most cheering thought to me in the task which lies before me, is the hope that I may be able, by judicious conduct and encouragement, to contribute to the building up of a Bar worthy of the metropolis of the State, and worthy to wear the mantles of those who have preceded them. The Hon. Montgomery Blair, whose distinguished career is familiar to all of us, in his late professional visit to Nashville paid us the compliment of saying that he had always heard our Bar spoken of as being an able one, and he was kind enough to add that he found it still merited its renown. In a few years, the young men who are listening to me must take the places of those who are now the leaders. They must be the great lawyers of their day and generation. Let them aim to qualify themselves for their high calling. It will give me great pleasure, if they will do their duty, to aid them in their task.

BOOK NOTICES.

T. & J. W. Johnson & Co., Law Booksellers and Publishers, No. 535 Chestnut Street, Philadelphia, have presented us a new work entitled *The Law of Appellate Proceedings*, by THOMAS W. POWELL. It is a neatly printed and well bound book.

We have had no time to thoroughly examine the work, but have read a part, and from our examination have no hesitation in recommending it warmly to the profession. It is no mere digest or confusedly written work; but, from our examination, we believe that the principles of that branch of the law are thoroughly analyzed and clearly stated. We think any one can see, from only a slight examination of the book, that the author understood his subject. In the beginning of his preface the author says: "This book presents to the profession a subject not yet embodied in the form of a separate treatise; and the author was, therefore, in a great measure, obliged to analyze the subject for himself, and gather his materials in an untried path, without a predecessor."

Many may suppose that a work upon such a subject is of no great use. It is true, that appellate proceedings depend, in a great measure, upon the statutes of the State in which one lives, and the statutes of one State differ, in this particular, greatly from those of other States. But, we predict that no lawyer will read this treatise without finding that he has been benefitted, and that his knowledge upon the subject has been enlarged and made more accurate.

Wigram on Wills, Extrinsic Evidence, and O'Hara on the Construction of Wills.

We take pleasure in highly recommending to the profession the volume containing these two works.

The first is a new edition, by JOHN P. O'HARA, Esq., of the valuable treatise of Sir James Wigram upon the admissibility of extrinsic evidence in the interpretation of wills; and the second,—the production of Mr. O'Hara himself, and the complement of the first,—deals with the general subject of the construction of wills.

The admirable method of Sir James Wigram's book adds greatly

to its excellence, and distinguishes it favorably, in our judgment, from the generality of English elementary treatises upon legal subjects, which, however solid and comprehensive, partake too much of the nature of mere congeries of adjudications, and are, consequently, apt to be very heavy reading. Here the matter has been thoroughly elaborated and the essence extracted. The results of the author's investigations are set forth with the formality and luminous precision of geometrical theses, in the shape of seven propositions, each of which is the text of a separate chapter, wherein it is maintained, developed and elucidated. These seven chapters, with a brief prefatory chapter; a supplementary chapter upon Lord Bacon's rule as to latent and patent ambiguities; a chapter summing up the results of the inquiry; and a short appendix, in which are set forth the illustrative cases of *Goblet vs. Beechy*, and *Attorney General vs. Grote*, comprise the work. The former case arose upon the will of the sculptor Nollekens, and is very interesting and instructive.

The editor has embodied the subsequent English legislation and decisions, and the American decisions, upon the topic of the work. He has discharged his task unambitiously, but with conscientious and laborious fidelity.

We know of no other work capable of supplying the place of Sir James Wigram's. The subject, too, is one of great importance, especially in this country, where wills are so much more seldom drafted by special hands than in England, and hence are so much more frequently vague and inartificial than there. As may readily be supposed, there is often evidence outside of the will itself capable of clearing up, in point of fact, doubts arising from ambiguities upon the face of the instrument; and so it becomes material to ascertain exactly how far, and in what respects, such extrinsic evidence may be resorted to for this purpose. The work before us appears to be a comprehensive compendium of the law down to the present time upon this subject, and its treatment displays the very perfection of form.

The exposition of the law of construction, by Mr. O'Hara, which completes the volume, is also entitled to the same kind of praise as its companion. The field here, however, being more extensive, it was not practicable to distil the results of the survey into a few propositions, which, expanded and illustrated, should exhaust the discussion. But as high a degree of condensation has been attained as was compatible with the full and clear exhibition which is given of the various rules of law, with all their modifications and limitations.

Nearly all the law of wills is necessarily passed under review, in its relation to the subject of construction, and the practitioner possessed of this volume will hardly need any other text book upon this branch of jurisprudence. The finish of the execution, the thorough digestion of the matter, and the admirable comprehension under appropriate principles of all the details, especially adapt this, as the same qualities adapt its companion treatise, to the requirements of the student.

A Treatise on the Construction of Wills. By FRANCIS VAUGHAN HAWKINS, M. A., of Lincoln, Inn., Barrister-at-Law, Fellow of Trinity College, Cambridge. With notes and references to American Decisions, by JNO. SWORD, of the Philadelphia Bar, in one vol. oct. T. & J. W. Johnson & Co., Law Booksellers and Publishers, No. 535 Chestnut Street, Philadelphia.

The object of this tersely written work is, to use the language of its author, "to embody in a definite and intelligible form that portion of the vast mass of reported cases on testamentary construction, which really constitutes the law of the courts at the present day, and governs the judicial construction of wills." It is, in fact, a concise statement of the rules of testamentary construction, on the meaning attached by the Courts to certain words or forms of expression where the true intention of the testator cannot be gathered from the context. Rules of Law which act independently of intention, such as the rule in Shelley's case, are not included in the work. The existing rules of construction are of two classes: first, the old rules, some of very ancient date, many of which are inconvenient in their operation and often based on an entire misconception of the case, on which they originally rested; and secondly, the more modern rules, chiefly relating to minor matters and subordinate parts of the testamentary disposition. These latter are of far more importance than the former, for it is their function to supply omissions in points of detail not affecting the vital parts of the disposition, and to remedy some of the ambiguities and ordinary slips of language employed in a will. The work is intended to embrace the question of testamentary law on which rules of construction exist. When there is no such rule laid down, the intention is the sole guide; reported cases may assist by supplying suggestions, but they do not govern. The tendency of courts now is to avoid creating (except in minor matters) any fresh rules and not to extend the older rules beyond their present limits. If this principle be acted on, the law necessary to be known for

purposes of construction may be reduced within moderate compass, and this treatise is designed to show the form in which it might be attained.

The author assures us that he has worked out the points in the book, and has not altogether relied upon other writers for his conclusions, though admitting the obligations he is under to Mr Jarman in his comprehensive treatise upon the subject.

The object of the American edition is to show what is the Law on the topics treated of in the text in the various States of this country, so far as they have been determined by statute or judicial decision. In all cases where the English decisions have been adopted by our courts, the American edition has simply referred to the cases, deeming it useless to add anything to the concise and admirable statement of the author. When the American cases differ from the English, the point of difference is briefly stated. Speculations as to the correctness of the doctrines advanced by American courts have been carefully avoided, and the reader is left to draw his own inferences.

The work is certainly worthy of extensive patronage, and we cordially commend its merits to the profession.

Commentaries on the Common Law, designed as introductory to its Study. By HERBERT BROOM, LL. D., from the Fourth London Edition. Price £6.00. Published by Messrs. T. & J. W. Johnson & Co., Philadelphia.

In the April number of this Review we found occasion to say : "It used to be the fashion to go into ecstasies over Blackstone. Of late he has come in for his share of dispraise and disparagement. The learned Mr. Austin, in his 'Jurisprudence,' uses the following language respecting him : 'The method observed by Blackstone in his far too celebrated commentaries is a slavish and blundering copy of the very imperfect method which Hall delineates roughly in his short and unfinished Analysis: From the outset to the end of his commentaries he blindly adopts the mistakes of his rude and compendious model, missing, invariably, with a nice and surprising infelicity, the pregnant but obscure suggestions which it proffered to his attention, and which would have guided a discerning and attentive writer to an arrangement comparatively just. Neither in the general conception, nor in the details of his book, is there a single particle of original and discriminating thought. He had read somewhat, though far less than is commonly believed ; but he had

swallowed the matter of his reading, without choice and without rumination. He owed the popularity of his book to a paltry but effectual artifice, and to a poor superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions which was then devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason. And to this paltry but effectual artifice he added the allurements of a style which is fitted to tickle the ear, though it never, or rarely, satisfies a severe and masculine taste. For that rhetorical and prattling manner of his is not the manner which suited the matter in hand. It is not the manner of those classical Roman jurists, who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and flimsy dress of a milliner's doll from the graceful and imposing nakedness of a Grecian statue.'

We must frankly confess that we take pleasure in every kick which Professor Austin bestows upon his countryman, the old humbug of the commentaries, with his sentimental, rose-colored puffs of the English law."

From the necessarily hasty glance we have been compelled to give to Mr. Broom's commentaries, we nevertheless feel satisfied that they go far towards supplying the place heretofore filled, as we think, inadequately by Blackstone's. The style is singularly clear and condensed, and the author especially felicitous in the terseness of his definitions. In a work of this kind definitions are almost the principal feature, and none but those who have attempted it can realize the difficulty of grasping and confining within a few accurate sentences principles elaborately spun out in lengthy decisions, and of varied and subtle hues of meaning. We fancy that Mr. Broom's former work, "*A Selection of Legal Maxims*," has had much to do in disciplining his mind and thought into terse, pithy, yet accurate and clear meaning expressions. The sentences are not, however, isolated, or even seemingly isolated, as most times they are in writers of this kind,—terse, pithy writers,—but are logically linked together and follow in clear, consecutive order, and for this reason one, especially a beginner, will find much less difficulty in catching and appreciating the meaning and spirit of the whole performance, while at the same time charmed with each division or separate act. Mr. Broom writes, evidently, with a profound admiration and love for the Spirit of the Law, deeply persuaded that its principles are based

in truth and justice, and "admirably adapted and adjusted to the changing wants and necessities of society," and through this sympathy with his subject has made the warm life-blood to start and course through what, under Dr. Blackstone's treatment, seemed an inanimate corpse. The passiveless features have been lit up with the expression of a soul. Students, we feel sure, would do well to throw aside their Blackstones and replace them with this altogether admirable work.

Fraudulent Conveyances. A Treatise upon Conveyances made by Debtors to defraud Creditors, containing references to all the cases, both English and American. By ORLANDO F. BUMP, Counsellor at Law. Published by Messrs. Baker, Voorhis & Co., 66 Nassau St., N. Y.

We have received this work too late to give a critical notice. A hasty glance, however, assures us that the author has more than sustained his already deservedly wide-spread reputation as a clear, systematic and logical law-writer. His present work certainly treats of one of the most interesting subjects in the whole body of the law, and one the thorough knowledge of which is perhaps of more every-day practical need and benefit to the practicing lawyer than any other. The work seems to have been constructed upon the theory that fraud is always a question of intent, and to have been arranged throughout to unfold and develop this theory, thus giving unity, system and symmetry to the entire Treatise, and rendering it clear and compact.

The work is published in a handsome octavo volume, and in the best law book style, at \$7.50, upon receipt of which the publishers will send it prepaid. We cannot commend the publications of this Firm, for neatness and beauty of general make-up, too favorably.

A Treatise on the Law of Set-off, Recoupment, and Counter-claim. By Thomas W. Waterman, Counsellor at Law. Second edition. Published by Baker, Voorhis & Co., New York.

This work, also, was sent too late for critical examination and review. The first edition, however, acquainted the profession generally with its scope and purpose, and the laborious, critical care and thought bestowed upon it by its author. In this edition more than a hundred new sections, and several hundred additional cases, have been added, rendering it of considerably enhanced utility.

American Journal of Insanity. Utica, N. Y.

The Cincinnati Superior Court Reporter.
The National Bankruptcy Register. New York.
Advance sheets of Gray vs. Jackson, to appear in 51 New Hampshire Reports, from John M. Shirley, State Reporter.
Bench and Bar. Chicago.
American Law Record. Cincinnati.
Pittsburgh Legal Journal.
Maryland Law Reporter. Baltimore.
Lancaster Bar.
Pacific Law Reporter. San Francisco.
Legal Gazette. Philadelphia.
The Chicago Legal News.
The United States Jurist. Washington, D. C.
The Insurance Law Journal. St. Louis.
The Albany Law Journal.
The Daily Register. New York.
The Law News. St. Louis.

The argument of Messrs. John Ruhm and John Lawrence, attorneys for plaintiff in error in the case of *R. Weitmuller vs. The State of Tennessee*, before the Supreme Court, December term, 1872. The main question was, whether lager beer, in the sense of the Code, is a spirituous liquor. The able counsel very learnedly and voluminously point out the distinction between spirituous and malt liquor, the Code prohibiting only the sale of the former on the Sabbath, and claim that the language of Judge Milligan in *State vs. Sharrer* 2 Cold., 32, 7, that "the words spirituous liquors used in Sec. 4859-60 of the Code are evidently employed in a general sense, and intended to comprehend all alcoholic or intoxicating liquors," gives an incorrect construction to the legislative enactment quoted. The Supreme Court have sustained the position of Messrs. Ruhm and Lawrence in an elaborate opinion, delivered by Chief Justice Nicholson on the 21st of last month.

We have received from Messrs. Baker, Voorhis & Co., New York, Vol. IX of *Blatchford's Circuit Court Reports*, which we commend to the favor of the profession.

We have received, at the latest hour of going to press, from Messrs. Kay & Brother, Philadelphia, Vol. I of the third edition of Wharton and Stille's *Medical Jurisprudence*, which treats of "Mental Unsoundness and Psychological Law," and *Hilliard on New Trials*, second edition. The publishers deserve the highest praise for the handsome manner in which these books are gotten up. The next number of this *Review* will contain extended notices of each.

C H A R T

OF THE

Southern Law & Collection Union.

[To save the labor and expense of sending a receipt to each subscriber, we will in the next (April) number, place an asterisk at the end of the names of all those from whom we shall have received payment.]

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DeKalb,	James E. Rose,	Auburn.
Elkhart,	R. M. Johnson,	Goshen.
Floyd,	Huckeby & Huckleby,	New Albany.
Fountain,	Nebeker & Cambern,	Covington.
Franklin,	Chas. Moorman,	Brookville.
Gibson,	Wm. M. Land,	Princeton.
Grant,	G. T. B. Carr,	Marion.
Hamilton,	Evans & Stephenson,	Noblesville.
Hancock,	James L. Mason,	Greenfield.
Harrison,	Wolfe & Stockalager,	Corydon.
Henry,	Wm. Grose,	New Castle.
Howard,	J. H. Kroh,	Kokomo.
Huntington,	DeLong & Cole,	Huntington.
Jackson,	Long & Long,	Brownstown.
Jasper,	Thomas J. Spittler,	Rensselaer.
Jay,	James W. Templer,	Portland.
Jefferson,	Wilson & Wilson,	Madison.
Johnson,	Jno. W. Wilson,	Franklin.
Knox,	J. S. Pritchett,	Vincennes.
LaGrange,	C. U. Wade,	LaGrange.
Lake,	Horine & Fancher,	Crown Point.
LaPorte,	E. G. McCollum,	LaPorte.
Madison,	James H. McConnel,	Anderson.
Marion,	Robert N. Lamb,	Indianapolis.
Monroe,	James B. Mulky,	Bloomington.
Morgan,	J. V. Mitchell,	Martinsville.
Ohio,	S. R. & D. T. Downey,	Rising Sun.
Perry,	Charles H. Mason,	Cannelton.
Pike,	Charles H. McCarty,	Petersburg.
Porter,	Thomas J. Merrifield,	Valparaiso.
Poesy,	Spencer & Loudon,	Mt. Vernon.
Randolph,	Browne & Thompson,	Winchester.
Scott,	W. C. Price,	Lexington.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Sullivan,	John T. Gunn,	Sullivan.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith	Bluffton.

I O W A.

Benton,	John Shane,	Vinton.
Boone,	C. W. Williams,	Boonesboro.

I O W A—Continued.

COUNTY.	NAME.	POST OFFICE.
Cass,	J. T. Hanna,	Atlantic.
Gerre Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clark,	John Chaney,	Osceola.
Clinton,	Albert L. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Dusee & Henderson,	Dubuque.
Fayette,	Ainsworth & Mill'ar,	West Union.
Greene,	Jackson & Potter,	Jefferson.
Guthrie,	Wm. Elliott,	Panora.
Hancock,	James Crow,	Ellington.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	T. W. & John S. Woolson,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	George D. Woodin,	Sigourney.
Lee,	Frank Allyn,	Keokuk.
Linn,	J. M. Preston & Son,	Marion.
Lucas,	E. B. Woodward,	Chariton.
Madison,	J. & B. Leonard,	Winterset.
Marion,	Atherton & Anderson,	Knoxville.
Marshall,	Parker & Rice,	Marshalltown.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Phillips & Phillips,	Des Moines.
Pottawatomie,	Baldwin & Wright,	Council Bluff.
Poweshiek,	L. C. Blanchard,	Montezuma.
Scott,	Stewart & Armstrong,	Davenport.
Tama,	C. B. Bradshaw,	Toledo.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Milligan,	Afton.
Wapello,	E. L. Burton,	Otumwa.
Warren,	Bryan & Seevers,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Corydon.
Webster,	J. F. Duncombe,	Fort Dodge.
Winneschiek,	John T. Clark,	Decorah.
Woodbury,	Isaac Pendleton,	Sioux City.

K A N S A S.

Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Atchison,	Horton & Waggener,	Atchison.
Bourbon,	W. J. Bawden,	Fort Scott.
"	E. F. Ware,	
"	A. A. Harris,	"
Butler,	W. T. Galliher,	Eldorado.
Chase,	S. N. Wood,	Cottonwood Falls.
Coffey,	Fearle & Stratton,	Burlington.
"	J. Cox,	"

KANSAS—Continued,

COUNTY.	NAME.	Post Office.
Doniphan,	Sidney Tennent,	Troy.
Douglas,	A. J. Reid,	Lawrence.
Franklin,	A. Franklin,	Ottawa.
Jackson,	Wm. Henry Dodge,	Holton.
"	A. M. Crockett,	Netawaka.
Jefferson,	W. E. Stanley,	Oskaloosa.
Leavenworth,	Clough & Wheat,	Leavenworth City
Lyon,	W. T. McCarty,	Emporia.
Miami,	James Kingsley,	Paola.
Morris,	A. J. Hughes,	Council Grove.
Pottawatomie,	R. S. Hick,	Louisville.
Shawnee,	James M. Spencer,	Topeka.

KENTUCKY.

Ballard,	G. W. Reeves,	Blandville.
Barren,	Smith & Son,	Glasgow.
Bath,	Nesbitt & Gudgeon,	Owingsville.
Caldwell,	F. W. Darby,	Princeton.
Callaway,	R. D. Brown,	Murray,
Carter,	J. R. Botts,	Grayson.
Christian,	Ritter & Syper,	Hopkinsville.
Clarke,	W. M. Beckner,	Winchester.
Daviess,	G. W. Ray,	Owensboro.
Fayette,	Wm. C. P. Breckenridge,	Lexington.
Fleming,	A. E. Cole,	Flemingsburg.
Floyd,	E. G. H. Harris,	Prestonsburg.
Franklin,	T. N. & D. W. Lindsey,	Frankfort.
Garrard,	Jas. A. Anderson,	Lancaster.
Grant,	W. T. Simmonds,	Williamstown.
Grayson,	Thomas E. Ward,	Litchfield.
Green,	Wm. B. Allen,	Greensburg.
Greenup,	B. F. Bennet,	Greenup.
Hart,	George T. Reed,	Manfordsville.
Henry,	Buckley & Buckley,	New Castle.
Hickman,	F. M. Ray,	Clinton.
Jefferson,	Edward Badger,	Louisville.
"	J. S. Pirtle,	"
"	Gasley, Yeaman & Reinecke,	"
"	R. & L. Buchanan,	"
"	Easton & Callaway,	"
"	St. John Boyle,	"
"	E. W. C. Humphries,	"
"	D. W. Armstrong,	"
"	G. P. Arbogust,	"
"	Lee & Rodman,	"
"	Alex. Willey,	"
"	D. W. Sanders,	"
"	Robert W. Hays,	"
"	B. H. Young,	"

KENTUCKY—Continued.

COUNTY.	NAME.	POST OFFICE.
Jefferson,	Andrew Barnett,	Louisville.
"	Boone & Boone,	"
"	Ward & Ward,	"
"	W. W. Bradley,	"
"	Duke & Richards,	"
"	B. H. Allen,	"
"	James A. Beattie,	"
"	Alfred T. Pope,	"
"	T. & J. Caldwell,	"
"	Buford Twyman,	"
"	A. Winston,	"
"	Russell & Helms,	"
Jessamine,	H. A. Anderson,	Nicholasville.
Johnson,	J. Frew Stewart,	Paintsville.
Knox,	F. P. Stickley,	Barboursville.
Lewis,	George T. Halbert,	Wanceburg.
Livingston,	Bush & Bush,	Smithland.
Logan,	A. G. Rhea,	Russellville.
Lyon,	Dan. B. Cassidy,	Eddyville.
McCracken,	Houston & Houston,	Paducah.
McLean,	S. J. Boyd,	Calhoun.
Magoffin,	D. D. Sublett,	Salersville.
Meade,	Kincheloe & Lewis,	Brandenburg.
Mercer,	Spilman & Spilman,	Harrodsburg.
Metcalf,	John W. Compton,	Edmonton.
Montgomery,	John Jay Cornelison,	Mount Sterling.
Oldham,	J. W. Clayton,	Lagrange.
Powell,	A. C. Daniel,	Stanton.
Pulaski,	W. H. Pettus,	Somerset.
Rock Castle,	James G. Carter,	Mt. Vernon.
Russell,	J. A. Williams,	Jamestown.
Scott,	Geo. E. Prewitt,	Georgetown.
Shelby,	Erasmus Frasier,	Shelbyville.
Simpson,	G. W. Whitesides,	Franklin.
Taylor,	D. G. Mitchell,	Campbellsville.
Todd,	J. H. Lowry,	Elkton.
Trigg,	Jno. S. Spiceland,	Cadiz.
Trimble,	Jacob Yeager,	Bedford.
Union,	John S. Geiger,	Morgansfield.
Warren,	Bates & Wright,	Bowling Green.
Washington,	Richard J. Browne,	Springfield.
Webster,	A. Edwards,	Dixon.
Woodford,	Turner & Twyman,	Versailles.

LOUISIANA.

Ascension,	R. N. Sims,	Donaldsonville.
Avoyelles,	Irion & Thorpe,	Marksville.
Baton Rouge,	George W. Buckner,	Baton Rouge.
"	Henry Avery,	"

LOUISIANA—Continued.

COUNTY.	NAME.	POST OFFICE.
Caddo,	Newton C. Blanchard,	Shreveport.
"	Duncan & Moncure,	"
"	J. H. Kilpatrick,	"
"	James S. Ashton,	"
Caldwell,	Arthur H. Harris,	Columbia.
Carroll,	Ed. F. Newman,	Providence.
Catahoula,	Smith & Boatner,	Harrisonburg.
East Feliciana,	Frank Hardesty,	Clinton.
"	D. J. Wedge,	"
Franklin,	Wells & Corkern,	Winslow.
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine.
Iberia,	Robert S. Perry,	New Iberia.
"	L. H. Montange,	"
"	U. S. Haase,	"
"	Wm. F. Schwing,	"
"	Jos. A. Breaux,	"
Jackson,	James E. Hamlett,	Vernon.
"	Ed. E. Kidd,	"
Jefferson,	Wm. Mithoff, Jr.,	Carrollton.
Lafayette,	Conrad Debaillon,	Vermillionville.
Lafourche,	Thomas L. Winder,	Thibodeaux.
"	J. S. Goode,	"
Madison,	Wells & Rainey,	Delta.
"	J. Tyson Lane,	Tallulah.
Morehouse,	Newton & Hall,	Bastrop.
"	D. C. Morgan,	"
Natchitoches,	Moræ & Dranguet,	Natchitoches.
Orleans,	Sam. C. Reid,	New Orleans,
"	Canonge & Cazabat,	46 Carondelet Street.
"	R. G. Harris,	New Orleans,
"	Richard DeGray,	24 Exchange Place.
"	A. A. Atocha,	New Orleans,
"	J. W. Kerr,	23 Commercial Place.
"	Peter J. Kramer,	New Orleans,
"	Sam'l R. & C. L. Walker,	P. O. Box 1112.
"	G. H. Braughn,	New Orleans.
"	Henry C. Dibble,	New Orleans,
"	John M. Bonner,	31 Commercial Place.
"	Robert L. Preston,	New Orleans,
Plaquemine,	Armand Lartigue,	34 Exchange Alley.
Point Coupee,	Thomas H. Hewes,	New Orleans,
Richland,	Wells & Williams,	61 Camp Street.
"	H. P. Wells,	New Orleans,
St. Martin's,	Felix Voorheis,	Lock Box 914.
"	DeBlanc & Tournet,	New Orleans.
		New Orleans,
		125 Gravier Street.
		New Orleans,
		43 Carondelet Street.
		Point a la Hache.
		P oint Coupee.
		Rayville.
		Delhi.
		St. Martinsvil'e.
		"

LOUISIANA—Continued.

COUNTY.	NAME.	POST OFFICE.
St. Landry,	Joseph M. M. Moore,	Opelousas.
"	J. F. Knox,	"
Tensas,	Reeve Lewis,	St. Joseph.
"	E. L. Whitney,	"
Terrebonne,	John B. Winder,	Houma.
"	J. L. Belden,	"
Union,	Barrett & Trimble,	Farmerville.
Webster,	A. B. George,	Minder.
Washita,	J. & S. D. McEnery,	Monroe.
"	Richardsons & McEnery,	"
"	R. G. Cobb,	"
West Feliciana,	Samuel J. Powell,	St. Francisville.
Winn,	W. R. Roberts,	Winnfield.
Assumption,	Hiram H. Carver,	Napoleonville.

MAINE.

Kennebec,	Joseph Baker,	Augusta.
Knox,	Geo. H. M. Barrett,	Rockport.
Oxford,	Virgin & Upton,	Norway.
Somerset,	E. W. McFadden,	Kendall's Mills.

MARYLAND.

Alleghany,	Semmes & Read,	Cumberland.
Anne Arundel,	Randal & Hagner,	Annapolis.
Baltimore,	Reverdy Johnson & C. G. Kerr,	Baltimore.
"	John Thompson Mason,	"
"	Daniel Clarke,	"
"	John I. Yeilott,	Towsonton.
Caroline,	James B. Steele,	Denton.
Cecil,	John E. Wilson,	Elkton.
Charles,	S. Cox, Jr.,	Port Tobacco.
Frederick,	Wm. P. Maulsby, Jr.,	Frederick.
Queen Anne's,	John B. Brown,	Centreville.
St. Mary's,	Combs & Downs,	Leonardtown.
Talbot,	C. H. Gibson,	Easton.

MASSACHUSETTS.

Bristol,	Charles A. Read,	Taunton.
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MICHIGAN.

Allegan,	Arnold & Stone,	Allegan.
Barry,	Wm. H. Hayford,	Hastings.
Bay,	C. H. Denison,	Bay City.
Calhoun,	Wm. H. Brown,	Marshall.
"	Alvan Peck,	Albion.
Houghton,	Ball & Chandler,	Houghton.
Huron,	Richard Winsor,	Port Austin.
Ingham,	Wm. H. Pinckney,	Lansing.
Isabella,	I. N. Fancher,	Isabella.

MICHIGAN—Continued.

COUNTY.	NAME.	POST OFFICE.
Jackson,	Johnson & Montgomery,	Jackson.
Macomb,	Edgar Weeks,	Mt. Clemens.
Marquette,	Maynard & Ball,	Marquette.
Oakland,	O. F. Wisner,	Pontiac.
Oceana,	F. J. Russel,	Hart.
Ottawa,	L. B. Soule,	Grand Haven.
Saginaw,	Gaylord & Hanchett,	Saginaw.
St. Clair,	Atkinson & Parsons,	Port Huron.
St. Joseph,	Mason & Melendy,	Centreville.
Shiawassee,	E. Gould,	Owasee.
Tuscola,	J. P. Hoyt,	Caro.
Wayne,	Meddaugh & Driggs,	Detroit.

MINNESOTA.

Benton,	J. Q. A. Wood,	Sauk Rapids.
Dodge,	G. B. Cooley,	Mantorville.
Fillmore,	Murray & McIntire,	Rushford.
Martin,	M. E. L. Shanks,	Fairmont.
Mower,	G. M. Cameron,	Austin.
Olmstead,	Butler & Shandrew,	Rochester.
Ramsey,	S. M. Flint,	St. Paul.
Stearns,	L. A. Evans,	St. Cloud.
Steele,	A. C. Hickman,	Owatonna.
Winona,	Simpson & Wilson,	Winona.

MISSISSIPPI.

Adams,	J. Perry Drake,	Natchez.
Amite,	George F. Webb,	Liberty.
Bolivar,	George T. Lightfoot,	Neblett's Landing.
Calhoun,	Roane & Roane,	Pittsboro'.
Carroll,	James Somerville,	Carrolton.
"	L. P. Yerger,	Greenwood.
Chickasaw,	Lacy & Thornton,	Okalona.
Choctaw,	John B. Hemphill,	French Camps.
Claiborne,	J. H. & J. F. Maury,	Port Gibson.
Clarke,	Evans & Stewart,	Enterprise.
Cochran,	James T. Rucks,	Friars' Point.
Holmes,	H. S. Hooker,	Lexington.
Itawamba,	Clayton & Clayton,	Tupelo.
Jasper,	Street & Chapman,	Paulding.
Jefferson,	B. B. Paddock,	Fayette.
Lauderdale,	Steel & Watts,	Meridian.
Lawrence,	K. R. Webb,	Brookhaven.
Leake,	Raymond Reid,	Carthage.
Lincoln,	Chrisman & Thompson,	Brookhaven.
Lowndes,	Leigh & Evans,	Columbus.
Madison,	S. M. Wook,	Canton.
Marshall,	Strickland & Fant,	Holly Springs.
Monroe,	John B. Walton,	Aberdeen.

MISSISSIPPI—Continued.

COUNTY.	NAME.	POST OFFICE.
Oktibbeha,	Sullivan & Turner,	Starkville.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Rankin,	W. B. Shelby,	Brandon.
"	J. M. Jayne, Jr.,	"
Tallahatchee,	Bailey & Boothe,	Charleston.
Tishomingo,	L. P. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
"	James T. Coleman,	"
Washington,	Trigg & Buckner,	Greenville.
Wilkinson,	L. K. Barber,	Woodville.
Winston,	W. S. Bolling,	Louisville.
Yalabusha,	Walthal & Gollady,	Grenada.
Yazoo,	Miles & Epperson,	Yazoo City.

MISSOURI.

Adair,	Ellison & Ellison,	Kirksville.
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	Wm. O. Forrist,	Mexico.
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.
Buchanan,	J. W. & John D. Strong & J. C. Hedenberg,	St. Joseph.
Butler,	Snoddy & Matthews,	Poplar Bluff.
Caldwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Carroll,	B. D. Lucas,	Carrollton.
Chariton,	Charles A. Winslow,	Brunswick.
Clay,	John T. Chandler,	Liberty.
Clinton,	Charles A. Wright,	Plattsburg.
Cole,	E. S. King & Bro.,	Jefferson City.
Cooper,	John Cosgrove,	Boonville.
Davies,	Richardson & Ewing,	Gallatin.
DeKalb,	Samuel C. Loring,	Maysville.
Dent,	G. S. Duckworth,	Salem.
Gentry,	I. P. Caldwell,	Albany.
Grundy,	Daniel Metcalf,	Trenton.
Harrison,	D. J. Heaston,	Bethany.
Hickory,	Charles Kroff,	Hermitage.
Holt,	T. H. Parrish,	Oregon.
Iron,	J. P. Dillingham,	Ironton.
Jackson,	Holmes & Dean,	Kansas City.
Jasper,	Wm. Cloud,	Carthage.
Johnson,	N. H. Conklin,	Warrensburg.
Lafayette,	Ryland & Son,	Lexington.
Lawrence,	John T. Teel,	Mount Vernon.
Lewis,	F. W. Rash,	Monticello.
"	A. Hamilton,	La Grange.

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
Lincoln,	Wm. Frasier,	Troy.
Linn,	A. W. Mullins,	Linneus.
"	Thomas Whitaker,	Bucklen.
Livingston,	C. H. Mansur,	Chillicothe.
McDonald,	A. H. Kennedy,	Pineville.
Macon,	A. J. Williams,	Macon City.
Madison,	B. B. Cahoon,	Frederickton.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isaiah Latchem,	Oakhurst.
Moniteau,	Moore & Williams,	California.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Madrid.
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
Pike,	Fagg & Dyer,	Louisiana.
Putnam,	Fred. Hyde,	Unionville.
Ralls,	E. W. Southworth,	New London.
Randolph,	Porter & Rothwell,	Huntsville.
St. Francois,	F. M. Carter,	Farmington.
St. Louis,	Lewis & Daniel,	St. Louis,
"	A. H. Bereman,	571 ¹ / ₄ Chestnut St.
Saline,	John W. Bryant,	St. Louis,
Scott,	J. H. Moore,	Cor. 4th & Olive Sts.
Stoddard,	Hicks & McKeon,	Marshall.
		Commerce.
		Bloomfield.

MONTANA.

Edgerton,	W. E. Cullen,	Helena.
Madison,	Samuel Word,	Virginia City.

NEBRASKA.

Cass,	Maxwell & Chapman,	Plattsmouth.
Johnson,	Charles A. Holmees,	Tecumseh.
Nemaha,	Jarvis S. Church,	Brownsville.
Otoe,	W. W. Wardell,	Nebraska.
Platte,	Leander Gerrard,	Columbus.

NEVADA.

Humboldt,	Patrick H. Harris,	Unionville.
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NEW HAMPSHIRE.

Cheshire,	E. M. Forbes,	Winchester.
Hillsboro,	G. Y. Sawyer & Sawyer Junior,	Nashua.

NEW JERSEY.

Cumberland,	Alex. H. Sharpe,	Millville.
Essex,	John W. Taylor,	Newark.
Hudson,	Joseph F. Randolph, Jr.,	Jersey City.
Hunterdon,	Alex. Wurts,	Flemington.

NEW JERSEY—Continued.

COUNTY.	NAME.	POST OFFICE.
Mercer,	Leroy H. Anderson,	Princeton.
Middlesex,	James H. Van Cleef,	New Brunswick.
Monmouth,	Charles Haight,	Freehold.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Long,	Somerville.
Sussex,	Robert Hamilton,	Newton.
Warren,	J. G. Shipman,	Belvidere.

NEW YORK.

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicotville.
Cayuga,	C. W. Haynes,	Port Byron.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabethtown.
Franklin,	Horace A. Taylor,	Malone.
Fulton,	McCarty & Parke,	Gloversville.
Genesee,	J. G. Johnson,	Batavia.
Greene,	Rufus W. Watson,	Cattskill.
Kings,	P. S. Crooke,	Brooklyn.
Lewis,	Edward A. Brown, Jr.,	Lowville.
Livingston,	Geo. W. Daggett,	Nunda.
Monroe,	H. & G. H. Humphrey,	Rocheater.
Montgomery,	J. D. & F. F. Wendell,	Fort Plain.
New York,	Broome & Broome,	New York, <small>10 Wall Street.</small>
"	Morrison, Lanterbach & Spingarn,	New York, <small>200 Broadway.</small>
"	Charles O'Connor,	New York.
"	Richard O'Gorman,	"
Ontario,	Metcalf & Field,	Canandaigua.
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
"	W. W. Oxx,	Bath.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	Merritt King,	Newfield.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

NORTH CAROLINA.

Anson,	R. Tyler Bennet,	Wadesboro.
Bertie,	James L. Mitchell,	Windsor.
Buncombe,	A. T. & T. F. Davidson,	Ashville.
"	J. G. Martin,	"
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.

NORTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE
Catawba,	John F. Murrill,	Hickory Tavern.
"	John B. Hussy,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
Cherokee,	John Rolan,	Murphey.
"	R. Pritchard,	"
Columbus,	J. W. Ellis,	Whiteville.
Currituck,	P. H. Morgan,	Indian Ridge.
Edgecomb,	W. H. Johnston,	Tarboro.
"	John M. Perry,	"
Greene,	W. J. Raspberry,	Snow Hill.
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Halifax C. H.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Jackson,	James R. Love,	Webster.
McDowell,	W. H. Malone,	Marion.
Mecklenberg,	W. P. Bynum,	Charlotte.
Onslow,	Richard W. Mixon,	Jacksonville.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth City.
Perquimans,	J. M. Albertson,	Hertford.
Pitt,	T. C. Singletary,	Greenville.
Richmond,	Gilbert M. Patterson,	Laurenborg.
Rockingham,	Reid & Settle,	Wentworth.
Rowan,	Blackmer & McCorkle,	Salisbury.
Sampson,	Milton C. Richardson,	Clinton.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.
Washington,	Edmund W. Jones,	Plymouth.
Yadkin,	John A. Hampton,	Hamptonville.

OHIO.

Adams,	F. D. Bayless,	West Union.
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapacneta.
Belmont,	M. D. King,	Barnesville.
Brown,	Baird & Young,	Ripley.
Carroll,	C. W. Newell,	Carrolton.
Clinton,	J. M. Kirk,	Wilmington.
Columbiana,	Henry C. Jones,	Salem.
Crawford,	Thomas Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington C. H.
Franklin,	John G. McGuffey,	Columbus.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randell,	Cincinnati.
"	Moulton & Johnson,	"
"	Henry Stanberry,	"

OHIO—Continued.

COUNTY.	NAME	Post Office
Hamilton,	A. Taft & Sons,	Cincinnati
"	Rufus King,	"
"	Stanley Mathews,	"
"	Thomas T. Heath,	"
"	Benj. Butterworth,	"
"	Hoadley & Johnson,	"
"	Archer & McNeill,	"
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Mahoning,	Landon Masten,	Canfield.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Coddington,	Medina.
Meigs,	J. P. Bradbury,	Pomeroy.
Miami,	W. S. Thomas,	Troy.
Montgomery,	J. A. McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnelsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville.
Pike,	J. J. Green,	Waverly.
Sandusky,	John Elwell,	Fremont.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Schaefer,	Canton.
Tuscarawas,	A. L. Neely,	New Philadelphia.
Union,	Porter & Sterling,	Marysville.
Washington.	Knowles, Alban & Hamilton,	Marietta.

OREGON.

Baker,	L. O. Sterns,	Baker City.
Benton,	John Burnett,	Corvallis.
Douglas,	W. R. Willis,	Roseburg.
Marion,	Chester . Terry,	Salem.

PENNSYLVANIA.

Alleghany	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Chester,	Alfred P. Reid,	West Chester.
Clarion,	David Lawson,	Clarion.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
Dauphin,	I. M. McClure,	Harrisburg

PENNSYLVANIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Elk,	George A. Rathburn,	Ridgeway.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	McDowell & Litman,	Uniontown.
Indiana,	J. N. Banks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Mercer,	Griffith & Mason,	Mercer.
Montour,	Isaac X. Grier,	Danville.
Northampton,	M. Hale Jones,	Easton.
Perry,	Lewis Potter.	New Bloomfield.
Philadelphia,	Wm. Henry Rawle,	Philadelphia. 710 Walnut Street.
Pike,	John Nyce,	Milford.
Schuylkill,	J. W. Ryan,	Pottsville.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

SOUTH CAROLINA.

Abbeville,	Thomas Thompson,	Abbeville C. H.
Anderson,	J. S. Murray,	Anderson C. H.
Barnwell,	John J. Maher,	Barnwell.
Barnwell,	Samuel J. Hay,	Barnwell.
"	Finley & Henderson,	Aiken.
Beaufort,	Colcock & Hutson,	Pocotaligo.
Charleston,	Memminger, Pinckney & Jervey,	Charleston.
"	Whaley & Minott,	"
"	M. L. Wilkins,	"
"	Brewster, Sprat & Burke,	"
"	Corbin & Stone.	"
"	Michael O'Connor,	"
"	Isaac M. Bryan,	"
"	Wilmot G. DeSaussure,	"
"	Simons & Siegling,	"
"	Magrath & Lowndes,	"
"	Simonton & Barker,	"
"	Asher D. Cohen,	"
"	Walker & Bacot,	"
"	Simons & Simons,	"
"	Whaley & Mitchell,	"
"	C. Richardson Miles,	"
"	I. N. Nathans,	"
"	Wm. Tennent,	"
"	Thomas M. Hanckel,	"
Chesterfield,	W. L. T. Prince,	Cheraw.
Clarendon,	Haynsworth, Fraser & Barron,	Manning.
Colleton,	Williams & Fox,	Waterboro'.
Darlington,	McIver & Boyd,	Darlington C. H.
Edgefield,	Thomas P. Magrath,	Edgefield C. H.
Fairfield,	James H. Rion,	Winnsboro'.

SOUTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
Greenville,	Earle & Blythe,	Greenville.
Kershaw,	Kershaw & Kershaw.	Camden.
Lancaster,	W. A. Moore,	Lancaster.
Laurens,	S. & H. L. McGowan,	Laurens C. H.
Marlborough,	Hudson & Newton,	Bennetsville.
Orangeburg,	W. J. DeTreville,	Orangeburg.
Pickens,	Whitner Symmes,	Walhalla.
Richland,	Melton & Clark,	Columbia.
"	E. R. Arthur,	"
"	Pope & Haskell,	"
"	Talley & Barnwell,	"
Spartanburg,	J. M. Elford,	Spartanburg.
Sumpter,	Richardson & Son,	Sumpter.
Union,	Robert W. Shand,	Union.
Williamsburg,	Barron & Gilland,	Kingstree.
"	S. W. Maurice,	"

TENNESSEE.

Bedford,	H. L. & R. B. Davidson,	Shelbyville.
"	Edmund Cooper,	"
"	Coldwell & Waters,	"
Benton,	W. F. Doherty,	Camden.
Bledsoe,	S. B. Northrup,	Pikeville.
Blount,	Sam. P. Rowan,	Marysville.
"	McGinley & Hood,	"
Bradley,	J. N. Aiken,	Charleston.
"	P. B. Mayfield,	Cleveland.
"	J. H. Gaut,	"
Cannon,	Burton & Wood,	Woodbury.
Carter,	Butler & Emmert,	Elizabethton.
"	H. M. Folsom,	"
Carroll,	James P. Wilson,	Huntingdon.
"	Hawkins & Towne,	"
"	E. F. Estes,	"
Coffee,	George W. Davidson,	Tullahoma.
"	W. P. Hickerson,	Manchester.
"	Iraby C. Stone,	
Cheatham,	L. J. Lowe,	Ashland City.
"	S. D. Power,	"
Claiborne,	Robert F. Patterson,	Tazewell.
Cocke,	McSween & Son,	Newport.
Davidson,	Neill S. Brown, Jr.,	Nashville.
"	J. R. Hubbard,	"
"	Allen & Covington,	"
"	Ed. Baxter,	"
"	John M. Bass, Jr.,	"
"	Wm. B. Bate,	"
"	M. M. Brien, Sr.,	"
"	Neill S. Brown,	"

TENNESSEE—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Davidson,	C. D. Berry,	Nashville.
"	J. B. Brown,	"
"	M. M. Brien, Jr.,	"
"	J. R. Dillin,	"
"	A. L. Demoss,	"
"	Guild & Dodd,	"
"	J. C. & J. M. Gaut,	"
"	Wm. A. Glenn,	"
"	Alex. A. Hall,	"
"	M. B. Howell,	"
"	T. A. Kercheval,	"
"	Philip Lindsley,	"
"	Overton Lea,	"
"	John Lellyett,	"
"	Thomas H. Malone,	"
"	F. C. Maury,	"
"	Wm. F. Meachem,	"
"	McClanahan & McAlister,	"
"	A. G. Merritt,	"
"	James C. Malone,	"
"	Rice & Thompson,	"
"	John Ruhm,	"
"	Wm. B. Reese,	"
"	Baxter Smith,	"
"	Stubblefield & Childress,	"
"	Thomas M. Steger,	"
"	James Trimble,	"
"	R. S. Tuthill,	"
"	G. P. Thruston,	"
"	M. Vaughn,	"
"	Frank E. Williams,	"
"	Watson & Spurlock,	"
"	G. W. Walters,	"
"	Edward H. East,	"
"	R. McP. Smith,	"
"	Wm. F. Cooper,	"
"	Robert Ewing,	"
"	John Reid,	"
"	Frank T. Reid,	"
"	Alex. B. Hoge,	"
"	J. T. Brown,	"
"	Andrew Allison,	"
"	Ed. Mulloy,	"
"	Wirt Hughes,	"
Decatur,	James M. Porterfield,	Decaturville.
"	A. A. teagald,	"
DeKalb,	Nesmith & Bro.,	Smithville.
"	Wm. B. Stokes,	"
Dickson,	R. M. Baldwin,	Charlotte

TENNESSEE—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Dyer,	A. P. Hall,	Dyersburg.
"	H. W. L. Turney,	"
"	S. R. Latta,	"
"	Charles C. Moss,	"
Fayette,	John W. Harris,	Somerville.
"	H. C. Moorman,	"
"	Wm. A. Milliken,	"
Fentress,	A. M. Garrett,	Jamestown.
Franklin,	Newman & Turney,	Winchester.
"	Fitzpatrick, Gregory & Davis,	"
"	John H. Martin,	"
"	James T. Shields,	Bean's Station.
Gibson,	G. H. Hall,	Trenton.
Giles,	James & W. H. McCallum,	Pulaski.
"	Jones & Ewing,	"
Grainger,	J. C. Hodges,	Morristown.
"	R. M. Barton,	"
Greene,	A. H. Pettibone,	Greenville.
"	H. H. Ingersoll,	"
"	Felix A. Reeve,	"
Grundy,	James W. Bouldin,	Altamont.
Hamilton,	M. H. Clift	Chattanooga.
"	Ben. S. Nicklen,	"
"	V. A. Gaskell,	"
"	Key & Richmond,	"
"	W. L. Aiken,	"
"	Green & Hope,	"
"	Brawner & Mayre,	"
"	Vandyke, Cook & Vandyke,	"
"	Nash Burt,	"
"	Lewis Shepherd,	"
"	Trewhitt & Sharp,	"
"	G. A. Wood,	"
"	Xen Wheeler,	"
"	Tomlinson Fort,	"
Hardin,	John A. Pitts,	Savannah.
Hawkins,	A. A. Kyle,	Rogersville.
"	F. M. Fulkerson,	"
"	W. F. Kyle,	"
Haywood,	H. B. Folk,	Brownsville.
"	Hall & Williamson,	"
"	E. J. & J. C. Read,	"
"	Benj. J. Lea,	"
"	Wm. F. Talley,	"
Henderson,	J. W. G. Jones,	Lexington.
Henry,	J. N. Thomason,	Paris.
"	Dunlap & Taylor,	"
Hickman,	O. A. Nixon,	Centreville.

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
Hickman,	Murphree & Cunningham,	Centreville.
Humphreys,	H. M. McAdoo,	Waverly.
"	V. S. Allen,	"
Jackson,	R. A. Cox,	Gainesboro'.
"	M. G. Butler,	"
"	George H. Morgan,	"
Jefferson,	O. C. King,	Mossy Creek.
"	Joel A. Dewey,	Dandridge.
Johnson,	Thomas S. Smyth,	Taylorsville.
Knox,	John Baxter,	Knoxville.
"	Chas. H. Flournoy,	"
"	Thornburgh & McGuffey,	"
"	J. H. Crozier & Son,	"
"	George Washington,	"
"	Washburn & Houk,	"
"	Lewis & Comfort,	"
"	M. L. Hall,	"
"	Cockee, Henderson & Tillman,	"
"	D. D. Anderson,	"
"	L. A. Gratz,	"
"	C. E. Lucky,	"
"	T. A. R. Nelson,	"
"	W. J. Hicks,	"
Lauderdale,	Wilkinson & Wilkinson,	Ripley.
"	Marley & Steele,	"
"	Lynn & Oldham,	"
Lincoln,	Bright & Sons,	Fayetteville.
"	J. H. Holman,	"
"	W. F. Kercheval,	"
"	Jo. G. Carrigan,	"
Macon,	M. N. Alexander,	Lafayette.
Marion,	Amos L. Griffith,	Jasper,
"	A. A. Hyde,	"
Marshall,	James H. & Thomas F. Lewis.	Lewisburg.
Maury,	Thomas & Barnett,	Columbia.
"	Looney & Hickey,	"
"	Vance Thompson,	"
"	Wright & Webster,	"
"	J. T. L. Cochran,	"
Meigs,	V. C. Allen,	Decatur.
"	T. M. Burkett,	"
Montgomery,	W. A. Quarles,	Clarksville.
"	John P. Campbell,	"
"	John F. House,	"
"	H. C. Merritt,	"
"	H. H. Lurton,	"
Monroe,	Staley & McCrosky.	Madisonville.
"	H. A. Chambers,	"
"	W. L. Harbison,	Sweetwater.

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
McMinn,	Briant & Richmond,	Athens.
"	T. N. Van Dyke,	"
"	Wm. M. Bradford,	"
McNairy,	James F. McKinney,	Purdy.
Obion,	J. G. Smith,	Troy.
Overton,	A. F. Gapps,	Livingston.
Perry,	James L. Sloan,	Linden.
Polk,	John C. Williamson,	Benton.
Putnam,	H. Denton,	Cookeville.
Roane,	Samuel L. Childress,	Kingston.
Robertson,	Wm. M. Hart,	Springfield.
"	John E. & A. E. Garner,	"
"	Stark & Judd,	"
"	George R. Scott,	"
Rutherford,	Ridley & Ridley,	Murfreesboro'.
"	E. D. Hancock,	"
"	John W. Burton,	"
"	Palmer & Richardson,	"
"	Avent & Childress,	"
Sevier,	G. W. Pickle,	Sevierville.
Shelby,	W. A. Dunlap,	Memphis.
"	H. Townsend,	"
"	Wat. Strong,	"
"	Wm. H. Stephens,	"
"	E. B. Barnes,	"
"	Adam Dixon,	"
"	Wm. J. Duval,	"
"	Van A. W. Anderson,	"
"	J. W. Scales,	"
"	Patterson & Lowe,	"
"	T. S. Ayres,	"
"	W. G. Rainey,	"
"	E. A. Cole,	"
"	Wright & Folks,	"
"	A. J. Martin,	"
"	Luke W. Finlay,	"
"	H. Clay King,	"
"	B. C. Brown,	"
"	R. P. Duncan,	"
"	H. G. Smith,	"
"	Wm. M. Smith,	"
"	Henry Craft,	"
"	C. W. Metcalf,	"
"	Humes & Poston,	"
"	W. L. Scott,	"
"	J. A. Anderson,	"
"	T. W. Brown,	"
"	Myers & Wyatt,	"
"	— McFarland,	"

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE
Shelby,	H. B. Martin,	Memphis.
"	Hanson, Estes & Dashill,	"
"	M. D. L. Stewart,	"
"	B. P. Anderson,	"
"	George W. Winchester,	"
"	Haynes & Stockton,	"
"	Charles Kortrecht,	"
"	Thos. C. Lowe,	"
"	W. P. Martin,	"
"	Harris & Harris,	"
"	Harris, Pillow & Pillow,	"
"	Young, Mallory & Reese,	"
"	Estis & Jackson,	"
"	James O'Pierce,	"
"	C. W. Frazier,	"
"	W. L. Duff,	"
"	Wm. B. Streer,	"
"	L. D. McKisick,	"
"	L. Lehman,	"
"	T. B. Edgington,	"
"	M. P. Jarnagin,	"
"	Walker & Horrigan,	"
"	Gantt & McDowell,	"
"	J. M. Crews,	Wythe Depot.
Smith,	E. W. Turner,	Garthage.
"	W. H. DeWitt,	"
"	Jas. W. Windle,	"
Sullivan.	W. D. Haynes,	Blountville.
"	D. F. Bailey,	Bristol.
Sumner,	Jas. W. Blackmore,	Gallatin.
"	Wilson & Vertrees,	"
"	J. A. Trousdale,	"
Stewart,	J. M. Scarborough,	Dover.
Tipton,	Peyton I. Smith,	Covington.
Trousdale,	McMurray & Bennett,	Hartsville.
"	W. J. Neely,	"
Warren,	John L. Thompson,	McMinnville.
"	Thos. Murray,	"
Washington,	P. P. C. Nelson,	Johnson Depot.
"	Felix W. Earnest,	Jonesborough.
"	S. W. Kirkpatrick,	"
Wayne,	R. P. & Z. M. Gypert,	Waynesboro'.
Weakley,	W. P. Caldwell,	Gardner.
"	Charles M. Ewing,	Dresden.
"	S. B. Ayres,	"
"	John Somers,	"
White,	W. M. Simpson,	Sparta.
Williamson,	Hicks & Magness,	Franklin.
"	Miller & Fowlkes,	"

TENNESSEE—Continued.

COUNTY.	NAME.	Post Office.
Williamson,	T. W. Turley,	Franklin.
"	David Campbell,	"
Wilson,	Tarver & Gollady,	Lebanon.
"	Andrew B. Martin,	"
"	Jordan & Jas. F. Stokes,	"
"	R. L. Caruthers,	"
"	M. M. Neil,	"
"	J. W. Phillips,	"
"	R. Cantrell,	"

TEXAS.

Anderson,	J. N. Garner,	Palestine.
Angelina,	H. G. Lane,	Homer.
Aransas,	Wm. W. Dunlap,	Rockport.
Atascosa,	W. H. Smith,	Pleasanton.
Austin,	Ben. T. & Charles A. Harris,	Bellville.
Bell,	McGinnis & Lowry,	Belton.
Bexar,	Thomas M. Paschal,	San Antonio.
Bosque,	Henry Fossett,	Meridian.
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbia.
Brazos,	John Henderson,	Bryan.
Burk,	James H. Jones,	Henderson.
Burleson,	A. W. McIver,	Caldwell.
Caldwell,	Nix & Storey,	Lockhart.
Calhoun,	John S. Givens,	Indianola.
Cameron,	Powers & Maxan,	Brownsville.
Cooke,	Weaver & Bordeaux,	Gainesville.
Dallas,	John M. Crockett,	Dallas.
"	W. M. Edwards,	"
Denton,	Jackson & Downing,	Denton.
Ellis,	H. H. Sneed,	Waxahatchie.
Falls,	T. P. & B. L. Aycock,	Martin.
Fannin,	Roberts & Semple,	Bonham.
Fayette,	Moore & Ledbetter,	Lagrange.
Fort Bend,	R. J. Calder,	Richmond.
Freestone,	Theo. G. Jones,	Fairfield.
Gonzales,	Harwood & Conway,	Gonzales.
Grayson,	Woods & Cowles,	Sherman.
Guadalupe,	Washington E. Goodrich,	Seguin.
"	John Ireland,	"
Harris,	Crosby & Hill,	Houston.
"	James Masterson,	"
Harrison,	J. B. Williamson,	Marshall.
Hill,	Wm. B. Tarver,	Hillsboro'.
Houston,	D. A. Nunn,	Crockett.
Hunt,	Sam. Davis,	Greenville.
Jack,	Thomas Ball,	Jacksboro'.
Jasper,	Moulton & Doom,	Jasper.

TEXAS—Continued.

COUNTY.	NAME.	POST OFFICE.
Jefferson,	J. K. Robertson,	Baumont.
Karnes,	Lawhon & Bookhout,	Helena.
Kaufman,	Manion & Adams,	Kaufman.
Kerr,	R. F. Crawford,	Kerrsville.
Lamar,	S. B. Maxey,	Paris.
Lavaca,	H. R. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
McLennan,	Flint, Chamberlin & Graham,	Waco.
"	F. H. Sleeper,	"
Marion,	Crawford & Crawford,	Jefferson.
Milam,	C. R. Smith,	Cameron.
Montague,	W. H. Grigsby,	Montague.
"	John H. Stephens,	"
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Gorsicana.
Newton,	John T. Stark,	Newton.
Nueces,	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Polk,	J. M. Crosson,	Livingston.
Red River,	W. B. Wright,	Clarksville.
Robertson,	F. A. Hill,	Calvert.
Sabine,	J. M. Watson,	Hemphill.
San Augustine,	S. B. Bewley,	San Augustine.
Tarrant,	Hendricks & Smith,	Fort Worth.
Titus,	Henry Dillahunty,	Mount Pleasant.
Travis,	Chandler & Carleton,	Austin.
"	Hancock & West,	"
"	W. R. Wallace,	"
"	A. M. Jackson,	"
"	M. A. Long,	"
"	Miller & Dowell,	"
"	G. Davis,	"
"	Chandler, Carleton & Robertson,	"
Trinity,	S. S. Robb,	Sumpter.
Usher,	J. L. Camp,	Gilmer.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Phillips, Lackey & Stayton,	Victoria.
Williamson,	Coffee & Henderson,	Georgetown.
Wise,	Booth & Ferguson,	Decatur.
Wood,	J. J. Jarvis,	Quitman.

UTAH.

Great Salt Lake,	Fitch & Mann,	Salt Lake City.
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VERMONT.

Caledonia,	Belden & May,	St. Johnsbury.
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VIRGINIA.

Accomack,	Gunter & Gillet,	Accomack C. H.
Albemarle,	Blakey & Rierson,	Charlottesville.
Alexandria,	Ball & Mushbach,	Alexandria.

VIRGINIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Augusta,	Effinger & Craig,	Staunton.
Buckingham,	N. F. Bocock,	Buckingham.
Campbell,	Wm. & J. W. Daniel,	Lynchburg.
Caroline,	Washington & Chandler,	Bowling Green.
Charlotte,	THOR. E. Watkins,	Charlotte C. H.
Culpepper,	A. R. Alcocke,	Culpepper.
"	Edward Cunningham,	Brandy Station.
Fairfax,	H. W. Thomas,	Fairfax C. H.
Fluvanna,	Wm. B. Pettit,	Palmyra.
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
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Hanover,	W. B. Winn,	Ashland.
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"	Alfred Morton,	"
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Jackson,	Henry C. Flesher,	Jackson C. H.
Jefferson,	Jo. Mayse,	Charleston.
"	McWhorter & Freer,	"
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St. Croix,	J. S. Moffatt,	Hudson.
Walworth,	H. F. Smith,	Elkhorn.
Washington,	Frisby & Weil,	West Bend.

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ENGLISH AND FRENCH LAW.

NUMBER TWO.

The notes from which these articles are taken were made, it will be remembered, in 1863-4, and the account given in the last number of the organization of the judicial system of England and France, must be considered as of that date. The progress of change since then in England is evidenced by the fact that the Superior Courts of Westminster are now composed of six Judges. It seems also that an appeal now lies from the Vice-Chancellor's decisions to one of the Lords Justices, instead of to the Lord Justices' Court. In this connection, it is proper to state that my first article contained a positive error, to which my attention has been called by an English friend. In speaking of the county courts, it was said that they were composed of local magistrates, and were now vested with power to dispose of civil cases of limited amount. The civil jurisdiction referred to has been entrusted to county courts presided over by a single Judge, and made courts of record. This change was made in 1847, and the tendency of legislation since that time has been to enlarge the jurisdiction of these courts.

There are several striking differences in the administration of criminal justice in France and England, besides those already noticed. The indictment in France consists of a detailed narration of the prisoner's life, especially dwelling upon any crimes or offenses against the law of which he may have been guilty, or even suspected to have been guilty, and of all the circumstances connected with the partic-

ular offense for which he is to be tried. This narration is usually drawn up with great care, and with a view to dramatic effect, and in important cases reads like a romance of the Eugene Sue order. On the trial, evidence is admitted in relation to previous offenses, or supposed offenses, as well as in relation to the principal charge. There is, moreover, no restriction upon the character of the evidence which may be given. Hearsay, rumors, and opinions are freely admitted. The record of every criminal trial is, therefore, necessarily burdened with a mass of what we would consider irrelevant, and even misleading testimony. We have already alluded to the examinations to which the defendant is subjected, both privately before the trial and publicly when on trial. On these latter occasions, and there is reason to fear that it is even worse in private, the Judge too often sinks his position as an impartial arbiter into the stern and inexorable inquisitor. The guilt of the prisoner seems to be taken for granted, and the awe naturally inspired by the judicial character is mercilessly used to extort a confession of guilt, or of circumstances which tend to establish guilt. The custom is for the Judge not only to interrogate the prisoner formally on trial, but to turn to him abruptly, at any stage of the case, and especially when a leading fact is deposed to, and to demand from him an immediate explanation. If an answer is given, the Judge often denies its truth, and points out objections and supposed inconsistencies, which the prisoner is expected to meet at once. It is easy to see how ignorance and timidity may be worked upon, especially if the Judge indulges, as he often does, in such expressions as these: "You know you are not telling the truth;" "Do you mean to add perjury to your other offenses," etc. The judicial dignity and impartiality are seriously compromised in the eyes of spectators by such a mode of conducting the trial. Moreover, the effect often is to bring the defendant and the witness into direct collision, and to turn the most solemn of all scenes into one of wrangling and recrimination.

Although the inquisitorial power thus exercised in France, and all over continental Europe, is occasionally dangerous to innocence and timidity, yet the general result is otherwise, and it is certainly favorable to the conviction of guilt. And it may be safely said, that while the examination of the defendant is sometimes abused, our own and the English courts are entirely too squeamish in utterly rejecting it. Mr. Stephens, in a recent work on the Criminal Law of England, written in a philosophical and inquiring spirit has come to the conclusion that the accused ought, in all cases, to be examined when

first taken up, and his examination reduced to writing. Such a course would often prevent made up defenses (not uncommon in England) involving the character of innocent third persons; as in the celebrated Costello case, for which Judge Phillips has been so severely handled, and quite recently in the Scottish cause celebre of Jenny McLaughlin. The examination ought to be made as soon as possible after the arrest of the defendant, and by some person other than the Judge who is required to try him. With these restrictions, and, perhaps, with some limitations as to the place and mode of examination, the practice might be introduced with advantage into our system. It is well known that the continental mode prevailed in England until a comparatively recent period, and there can be no doubt that it was allowed to fall into disuse because of the gross perversion of its instrumentality in the trials of persons for political offenses. The extreme severity of the English Criminal Code of the last century tended to produce the same result, the effort of both the judge and jury in a large number of cases being rather to acquit than condemn on account of the disproportion between the crime and its punishment.

The English are, in general, very unsparing in their abuse of the French inquisition, as they term it. They are never tired of referring to the cases in which it seems to have resulted in doing injustice. A recent case has given a new impetus to their zeal. A woman named Rosalie Boise was convicted of the murder of her father solely upon her own confession, for there were no circumstances, nor any evidence tending to establish her guilt. The jury, luckily as it turned out, found her guilty, with extenuating circumstances, and she was sentenced to imprisonment for life. Within a year after her conviction, the real murderer was tried and condemned for another offense, and, in the course of his examination, confessed to having committed the crime for which Rosalie was undergoing sentence. Thereupon, he was put on trial for the latter offense, and convicted. Under these circumstances, where two persons, without any connection in the act, are each convicted of the commission of the same crime, the French law provides that both convictions shall be set aside, and the parties re-tried together. This was accordingly ordered by the Court of Cassation, and on the new trial the man was convicted, and the woman acquitted. It turned out, on the second trial, that the woman had been driven to confession by the harsh treatment to which she had been subjected, and by the repeated assurances of the examining Judge that it would be bet-

ter for her in the end. Although far advanced in pregnancy, she had been confined in a close cell without any of the ordinary comforts of life, and refused all professional assistance, or even intercourse with her friends until she had confessed. It also appeared that afterwards, and before the trial, and again on the trial, she had withdrawn the confession, insisting that it had been wrung from her by official oppression, and had asserted her innocence. Her conviction, therefore, without any corroborating circumstances, was inexcusable, and can only be accounted for by the bias which the inquisitorial practice had produced on the Judge's mind.

This was a shocking case; but several recent instances of erroneous convictions, under the apparently more merciful English system, would seem to throw the balance in favor of the continent. An application to Parliament for relief on behalf of a sufferer in one of these cases, has lately brought the subject prominently before the English public. I quote the editorial of one of the leading London journals on the occasion. "Much as we are accustomed," is its language, "to boast of the perfection of our system of jurisprudence, it is still within the memory of man that a girl has been hanged for murder which she never committed; that a lawyer has been wrongfully convicted and transported for forgery; and a clergyman imprisoned because two children had perjured themselves. The case of Mr. Bewicke, of Threepwood Hall, Northumberland, is as monstrous as that of Mr. Barber, (the lawyer), or that of the Rev. Mr. Hatch. That two Judges should have sentenced a gentleman of high character and position, to four years penal servitude, on the evidence of ruffians who had themselves been convicted of crimes of magnitude, is a fact which shows how little respect is paid to that liberty of the subject on which we so pride ourselves, and is enough to make every man of us feel unsafe when he walks abroad. Mr. Bewicke, a gentleman of high position, whose family is traceable in an unbroken line to the conquest, was mulcted in the costs of a law suit, which he refused to pay except under coercion. The sheriff employed four men to distrain the debt, one of whom had been sentenced to seven years' transportation for perjury, and who was out on a ticket-of-leave; another had been three times punished for felony; the third had been several times convicted for assaults and for poaching; and the fourth had been successfully prosecuted for beating, and afterwards deserting his wife. These men conspired to charge Mr. B. with firing a pistol at them while in the discharge of their duty; the truth being that he had only fired off the pistol to change the load,

after calling out to the officers not to get in the way. Upon his trial, Mr. Bewicke undertook his own defense, was convicted, and sentenced to four years' penal servitude. A year afterwards the conspiracy was disclosed by one of the parties, and the other three were convicted of perjury and punished. Thereupon Mr. B. received a pardon. In the meantime, however, his property had been forfeited by the conviction for felony, and sold at a great sacrifice. The application now made to Parliament is for relief for the pecuniary losses sustained."

The British Government was very unwilling to entertain the application at all, and, I believe, it was finally rejected upon the ground that Parliament would, in that case, be assuming to act as a Court of Appeals in reviewing and reversing the legal proceeding, which would be a very dangerous precedent. It is a little remarkable, that almost at the very time this application was made to the British Parliament, a similar application was made to the Legislative Assembly of France, by the heirs of a man named Lesurque, who had been erroneously convicted and executed toward the close of the last century, for a highway robbery, of which he was innocent. The application was to have re-imbursed to his family a sum of fifty thousand francs, with interest, which had been forfeited to the State under this conviction. A majority of the Legislative Assembly at one time voted in favor of the application, but the Government resisted the measure so strongly upon the ground of its impolicy as a precedent, that the vote was reconsidered, and the application rejected. There can be no doubt of the danger of opening the door to such applications on behalf of convicted criminals, or their families, for, if once the way were opened, every conviction, where the amount would justify the attempt, would be sought to be legislatively reinvestigated. Any Government would be charged with a heavy burden, if it were made responsible for the errors, or supposed errors of its judicial tribunals. Very few cases are so plain as not to admit of any doubt, and ingenious counsel might easily throw suspicion over any finding. After the Government has provided for the trial of criminal causes in the manner best suited to the institutions of the people, with such guards for the protection of innocence as Legislative wisdom may suggest, it cannot be held responsible if the machinery sometimes goes wrong. The remedy for the pecuniary loss in such cases is to do away with the forfeiture of goods. This has been done in France and America, and ought to be in England, if in its recent innovations it has not already been.

The conviction of the innocent may happen under any system. It seems to take place oftener in England than in France, notwithstanding the superior tenderness to criminals of the English system in most respects. The reason of this is, no doubt, to be traced in part, to the haste with which criminal cases are dispatched, without any knowledge of the parties or the circumstances, except what is acquired on the trial. The Judge himself, under the French system, goes to the place where the crime was committed, examines the prisoner, and the witnesses, and makes an elaborate proces verbal of everything that he sees, hears or does. He comes to the trial, therefore, better posted than the witnesses or the counsel, and, if a really honest man, would never permit innocence to suffer, if convinced of its existence. In France, moreover, the trial is conducted by a public officer, whose duty it is to represent the State impartially. In England, on the contrary, there is no such officer in ordinary criminal cases. Every prosecution is conducted by counsel employed for the purpose by the prosecutor, and who does not stand impartial between the State and the prisoner. The bias of his retainer may warp his judgment, and it is not certain in every case, that a conviction of the prisoner's innocence would affect the vigor of the prosecution. An eminent lawyer, afterwards a Judge of distinction, Mr. Justice Coleridge, was the subject, in early life, of one of those virulent prosecutions by personal and political enemies, from which he escaped with some difficulty, having been tried for the murder of a young lady, of which he was wholly innocent. Lord Brougham is fully justified in his indignant reprobation of the law of public prosecutions in England. "Every civilized country, he says, except England, has undertaken to see justice administered in criminal cases under the supervision of its own officers. We choose to leave to private enterprise and public spirit, and private malice or vindictiveness, the enforcement of our penal laws."

The French and English system are equally distinctive in many respects in civil litigation. In the English system, the Courts are governed by precedents, and causes are determined by previous decisions either exactly in point, or so analogous as to be equally binding. By the French system the doctrine of binding precedents is, in theory, not recognized at all, and previous adjudications can only be referred to for the purpose of assisting the Judge in coming to a conclusion in the case before him on principle, and its own special facts. Of course, in practice, as I have already said, precedent often controls in France, while, on the other hand, in England, reason

sometimes overrides a whole batch of decisions. But the general rule still holds, the Judge, in the one system, relying on the ruling of his predecessors, no matter what may be his own convictions, if the question were presented to him for the first time, and, in the other, upon his own reason without reference to the action of his predecessors in similar cases. The mode, too, in which judgments are rendered in each system, tends to widen the differences. The French Code, as we have seen, expressly prohibits the Courts from pronouncing judgment "*par voie de disposition generale et reglementaire*," the *arret* being expressly based upon the recitals of fact in the particular case. English Judges are prone to lay down general principles, which may be held afterwards to govern whole classes of supposed analogous cases. The French Judge pronounces on the very case before him, being at liberty to decide the very next case differently, although the facts may be substantially the same, varying only in some unessential particular which appeals to the feelings, or suggests a new train of thought. It is obvious that much more latitude is, under this system, left to the Judge, and that the result of litigation depends more upon minute details of evidence, and upon the calibre of intellect and mental peculiarities of the functionary, than under the other system. Each system has its advantages, and, in truth, its disadvantages. If the one reduces law more nearly to a regular science, flowing along in an even channel with well defined banks, it also delays amelioration, and, to carry out the simile, suffers the stream to become clogged with the mud and debris of its ancient fountains. On the contrary, if the other leaves the natural reason and progressive intellect more unfettered, it gives a freer and wider scope to the errors of individual Judges. There is more fixedness, at any given period, in the one system, so that parties are the better enabled to ascertain their rights, and litigation is diminished. There is, perhaps, in the other less danger of the occurrence of decisions of particular hardship upon technical rules of law, but this benefit is counterbalanced by the increased litigation arising from the impossibility of saying, in advance, what effect the circumstances of a particular case may have upon the functionaries then in office. The knowledge that an incumbent of the bench will certainly decide in one way upon a particular state of facts, no matter what may be the character of his mind, because the precedents leave no room for doubt, is a powerful preventive against tentative litigation. Much of the evil of the English system is obviated by the fact that a course of decision based upon erroneous precedents may be promptly

changed by positive legislation. Uncertainty of judicial decision is a great evil, and that uncertainty, I cannot but think, is largely increased by leaving each case to turn upon its own circumstances, and upon the idiosyncracies of the Judge for the time being. A Hardwicke, a Mansfield, a Stowell, and a Marshall come only at intervals. If we give no weight to the decisions of such men beyond the influence which their reasoning may have upon the intellect of feeble successors, we lose much of the benefit of their work. No two men reason exactly alike. Some men, even Judges, are incapable of reasoning at all. But most men can form conclusions, and can conform them to the conclusions of illustrious predecessors. There is some truth in my Lord Coke's famous remark, that the common law was the perfection of reason, in the sense in which he uses it, that is, says his Lordship, not the perfection of any one man's natural reason, but an artificial perfection of reason gotten by long study and close application of able and learned men through a series of generations. A Judge, even of ordinary intellect, if he follow the light of the eminent men who have gone before him, may administer the law with the reasonable hope of doing good in his day and generation.

There is certainly one danger attending the English system where new questions are raised by the progress of society, and that is the stretching of the analogy of decided cases to mere resemblances, when, in fact, there is no real analogy. The famous likeness of Monmouth to Macedon, is not more far-fetched than some of the analogies which the learned judges have found between decisions in the Year Books, and the new cases that come before them in a radically different state of society. This danger was strikingly illustrated in a recent speech of Lord Chancellor Westbury in the House of Lords on the amendment of the English law. He said that when the railroad mania of 1843-4 began to assume formidable proportions, a number of projects were started, and committees of those who desired to become interested were formed in most of them for the purpose of making preliminary surveys and bringing the schemes before Parliament. Some of these projects fell through, and were abandoned after a good deal of expense was incurred, and suits were brought by the creditors against the members of the committees. The Courts, upon the analogy of the relation of the individuals composing these committees to that of partners in a common venture, held the members equally liable each for the whole debt, whether they had been active in creating the debts, or wholly ignorant of them. The consequence was, that many innocent and public spirited

persons, who had only loaned their names without actually participating in the proceedings, were entirely ruined. After some years, the same question happened to come before a learned judge (then present said the Chancellor) presiding in a different tribunal, who saw that there was no analogy between the two classes of cases, and reversed the previous decisions, and this last ruling had been since adhered to as being manifestly correct. But the consequence was, continued his Lordship, that many persons who had entrusted their money and performed services on the faith of the first course of decision were, in their turn, ruined.

These fluctuations of the judicial mind, are by no means unknown in France, and they cannot altogether be avoided so long as men are men. The ebbs and flows of mind, like those of the ocean, are disastrous, but they are inevitable. The spirit of every age differs from that of all previous ages, and makes itself felt, more or less, by every individual, and a Judge, with the intellect of an Ulpian, can no more escape its influence than the humblest citizen. All we can hope to accomplish by giving binding effect to the learning of the past, is to prevent, to some extent, too rapid and violent innovation. It is best, in our desire for change and progress, to imitate time, which, indeed, as Lord Bacon says, innovateth much, but slowly.

The French system, it need scarcely be said, is incompatible with the trial by jury. The discretion which might be safely entrusted to learned magistrates, would be likely to lead to complete uncertainty if left to weaker and less cultivated minds. The real advantage of the jury in civil cases is not so much any superiority in that mode of ascertaining the facts in the determination of private rights, as in its education of the people in a knowledge of the laws, and in increasing their capacity for self-government. It is in its political, rather than in its judicial aspects, that modern thinkers agree in upholding the trial by jury. Much of the freedom and greatness of ancient Rome may be traced to the use of judices—annually chosen jurymen—a list of whom was hung up in the forum, from which each litigant alternately chose a number to decide the questions of fact involved in the suit. It may be safely said that nothing can supply the practical education of the masses afforded by bringing them in direct contact with the ablest minds in their midst, enabling them to absorb legal and constitutional information, as it were, through every pore, and throwing upon them the responsibility of deciding upon the lives, fortunes, and characters of their neighbors, in the incessant and ever-varying conflicts of public and private litigation.

Under the English system, the jury finds the facts, and the court pronounces the law. Under the French system, the court determines both the law and the facts in civil cases. Under the one, the Judge yields (in theory) submissive obedience, as a general rule, to previous decisions; under the other, the Judge is at liberty to ignore the past, and to consider each case as a law unto itself. In theory, the gulf between the two systems seems broad and impassable. In practice, however, as we have already suggested, the differences are less palpable. The number of Judges called upon to decide a case in France, supplies, as we have seen, the place of a jury, who make up in superior intelligence any deficiency in the sum of heads. Again, the very divergence of individual views where there are so many Judges, leads, necessarily, to some common arbiter to reconcile them, and that arbiter is the authority of distinguished predecessors; in other words, precedent. The court, *ex necessitate*, comes at last to that which, *ex mero motu*, the English Judge does at first. The importance, therefore, of compilations of former decisions is recognized in France, though with this marked distinction from their English neighbors that the compilation is rather of principles, than of particular facts on which rulings are made. This distinction is well illustrated by the difference between the plan of making the syllabus of reported cases which is advocated by the American Law Review of Boston, and the plan adopted by Mr. Brightley, in his Federal Digest. The former plan requires a brief statement of facts and the ruling upon those facts; the latter endeavors to ascertain the principle of law which has been applied in the decision of the case. I may repeat what I have already intimated, that however divergent judicial systems may appear to be, and however varied their forms of administration, the substantial elements which lie at the base of the whole, and the practical workings for a common object, are wonderfully similar in like stages of civilization. The unity of the human race crops out in the very diversity of its productions.

The more rigid application of general principles deduced from precedents, to the varying facts of new cases, may be illustrated by one or two examples. Under the ancient canon law an illegitimate child was said to be *nullius filius*, from the difficulty of settling the paternity. But the sense of the term was extended by the decisions of the English courts, so as to deprive an illegitimate of any rights even of inheritance from the mother. Such a child was, under the decision of the courts, not only nobody's child, but no child at all. And even a devise to a child or children by the mother would

not embrace an illegitimate, so long as there was a legitimate child to answer the description. Upon the strength of these precedents, the Supreme Court of Tennessee, in *Ferguson vs. Mason*, 2 Sneed 618, carried the principle a step farther. The testator in that case had a son named Ignatius and a daughter named Ellenore. The son and the daughter had each a child named Harriet, the child of the daughter being illegitimate. In this state of facts the testator made his will, giving property to his daughter, Ellenore, during life, "and at her decease to fall and become the property of my grand-daughter, Harriet." The court admits that "testimony was adduced which tends to establish, beyond all controversy, that Harriet, the natural child of Ellenore, was the person intended by the testator as the object of his bounty." Yet the court held that the property devised went to the child of the son. The court wilfully violated the testator's intention in order to conform its decisions to the line of common law precedents. It may be safely said that no French court would have ever made such a decision.

A case tried while I was in London, before the Lord Chief Justice of the Court of Queen's Bench and a jury of Middlesex, and since reported in 3 F. & F., 614, will further illustrate the subject. The suit was for libel, brought by one R. J. Morrison, against Admiral Sir James Belcher, under the following circumstances: Everybody in England has heard of Zadkiel and his popular almanac, issued yearly for the benefit of the credulous, in which, in addition to the ordinary calculations, are inserted predictions of future events in the usual sibylline phraseology, purporting to be based upon the principles of judicial astrology. The author also offers to draw horoscopes, and tell fortunes through the instrumentality of the same somewhat obsolete science. He has published books on the subject, and, it is said, made distinguished converts. Early in the year 1863, when the predictions of the New Almanac for that year were being noticed by the press, either in the way of ridicule or puff, some one inquired, through the columns of the Daily Telegraph, "Who is Zadkiel?" To this inquiry, an anonymous correspondent replied by a letter, published in the same paper, that the plaintiff, Morrison, was Zadkiel, giving some account of his antecedents, and characterizing him as a person who made a living on the credulity of the multitude; that he was the same man who, some years before, had professed to own a mysterious crystal, bought, it was said, at the sale of the effects of Lady Blessington, in which strange visions could be seen, and who had, by the exhibition of this pretended talisman, succeeded in duping

many people out of their money. The action was brought for a libel in the statement in reference to the crystal, the defendant having admitted that he wrote the letter. Issues were joined on the pleas of justification and not guilty. The plaintiff was first introduced as a witness, and stated that he had been a Lieutenant in the British Navy from 1815 to 1827, and had, since then, been employed by government on the coast survey. He admitted that he had devoted his leisure to the study of judicial astrology, in which he was a firm believer; that he had published several books on that subject, such, for instance, as the *Grammar of Astrology*, *Lilly's Astrology*, and the *Horoscope*; and that he was the author of *Zadkiel's Almanac*, and *Zadkiel's Voice of the Stars*. He acknowledged that he undertook to make out nativities, and to give advice upon future acts and transactions, in doing which he always made long and laborious calculations, and charged for the labor when the parties were able to pay. He admitted that the money received in this way, and that arising from the sale of his books, constituted a part of his income. He said he did not undertake to prophecy, but only to predict the future. In reference to the crystal, he said that he had purchased it at Lady Blessington's sale; that his son, a lad of thirteen years of age, was the first person who professed to see objects in it, the visions seen by him relating to Sir John Franklin and the Arctic Seas; that afterwards many other persons professed to see visions therein; that the crystal had been exhibited several years previous to a large number of persons, many of them being of the nobility and clergy, among the latter being a Bishop and Archbishop; that it had been exhibited in the presence of the defendant perhaps twice, who did not, at the time, make any complaint of imposture. The witness expressly denied that he had ever taken money for exhibiting the crystal. He, himself, he said, had never seen, nor had he ever pretended that he could see anything in the glass. Others had seen visions in it, or said they had, and he fully believed them, not having any reason to doubt their word. The visions were of various kinds, sometimes of distant places unknown to the sight-seer, sometimes of deceased persons. The crystal could not always be used for the purpose of sight-seeing, on account of the difficulty of finding mediums or sight-seers. He admitted that he had advertised in his almanac for this year that he now had the services of two good mediums. One of these, a boy, had made sketches of some things he had seen. A few of these sketches were here produced and shown to the court and jury. One of these, which the defendant's counsel said looked like a Knight

Templar, the witness said was the genius of the crystal. Another, he added, was Titania; another, which was in full dress modern style, was Eve; another, Queen Mab, in a chariot; and still another, St. Luke. To the question how it was ascertained that the visions intended to represent such and such persons, he said that the figures described themselves, "What?" exclaimed the counsel, "do the visions speak so as to be heard?" "No," replied the witness, "but they have legends coming out of their mouths in which the explanations are made." "And in what language, pray," asked the learned counsel, "do these legends purport to be written?" "Sometimes in English, sometimes in Latin, and again in Persian, or Turkish, or Hebrew." "And who interprets the Turkish, the Persian, and the Hebrew, to say nothing about the Latin?" "Nobody; in those cases they are not interpreted at all." "And pray, in what language did Eve speak?" "In English." "And Titania?" "English." "And St. Luke?" "English, also." "Well," remarked the learned counsel, "it was natural enough for Titania to speak English, for we have the authority of Shakespeare for her accomplishments in that line, but that St. Luke should prefer it to Greek, and that Eve should have become familiar with it, evidenced an extension of the English speech in realms hitherto undreamed of."

In the meantime, the famous crystal itself was produced, and looked into by the Court, bar and jury, but without any of them developing into a sight seeing medium. It was a rock crystal three or four inches in diameter, with several flaws, handled by means of a ribbon, and carefully kept in a cushioned box. Several witnesses, male and female, were now introduced by the plaintiff. Some of them, of high rank, and two or three of them church dignitaries, whose testimony was to the effect that the plaintiff had freely shown the crystal about the time mentioned, bringing it to private houses when requested, and generally having with him a boy who professed to see the visions; that the plaintiff never claimed that he could see anything himself, and never took money for the exhibition. One of these witnesses, a clergyman, said that the medium, on one occasion, pretended to see his, the witness's son and wife, who were then in the West Indies, sitting in front of a house, but the description was so vague that it was impossible to test its accuracy. Another witness said, that he was at the house of Sir Edward Bulwer Lytton when the crystal was exhibited, and that a servant girl of Sir Edward's looked into the crystal, and described, in explaining what she saw, Knebworth, her master's country place, which she

had never seen. But Sir Edward, who was subsequently introduced as a witness, stated in this connection, that, although the girl had probably never seen his country place, he could not say that she might not have seen an engraving of it, and, moreover, that her description was so vague as to make no impression on him, which it otherwise certainly would have done, as he was then engaged in endeavoring to ascertain the natural causes by which strange and wondrous effects might be produced.

It may be well to note, by way of parenthesis, that the mysterious crystal in *What Will He Do With It*, and the whole of *A Strange Story*, are probably traceable to the distinguished Baronet's investigations here alluded to, but it must be admitted that, judging from them, he seems to have failed in the object had in view, the discovery of natural causes for mysterious phenomena. We are treated to the phenomena, or supposed phenomena, without being furnished with any satisfactory explanation thereof.

To return. An old lady, who was introduced as a witness, testified that the first time she ever saw the plaintiff, he came to her house with his crystal, at the request of some of her friends, to see whether it might not have a beneficial effect on her daughter who was then ill; that she had not been advised of his coming, and that, when he had explained his mission, she asked if she might look into the crystal, to which he readily assented; that she did look into it, and saw her mother who had been dead fifty years, and a little girl, which made her feel, she said, very solemn; that she then saw a figure in armor, with a brass helmet on, which the plaintiff said was the spirit of the crystal, and then she saw a young woman, dressed in pink, come in and lean on the shoulder of the other figure, and then they both faded away. She added, that she had often seen visions in the crystal, and her daughter had also. To the request of the defendant's counsel to take a look now, and tell the Court and jury what she saw, the witness hastily replied: "Oh, No! it is too solemn a thing!" The daughter being next introduced, testified that she had seen in the crystal Swiss cottages, bridal parties, and other like girlish visions.

It is needless to say that during the progress of the trial, the quiet of the Court was often interrupted by irreverent laughter. No testimony was introduced by the defendant, but his counsel made the most of the ludicrous aspect of the case. Among other things, in addressing the jury, he spoke in derision of the plaintiff's pretensions to Astrology, and of his undertaking to read the stars, now seeing

Jupiter in opposition to Saturn, Venus in conjunction with Mars, the Moon in the Seventh house,—“And now, interrupted his Honor from the Bench, he doubtless thinks himself in Scorpio;” a judicial witticism which was greeted with a fresh burst of merriment.

After the counsel had concluded their arguments, the learned Chief Justice, to the surprise of the bar, summed up in favor of the plaintiff. He said in substance, that whatever might be the imposture of the plaintiff in the matter of his almanac, or in his predictions based on judicial astrology, whether he really believed in the science which he professed, or only resorted to it to enable him to sell for six pence a pamphlet worth only one penny, was of no consequence in this suit, the gist of which was the untruthfulness of the charge of the defendant, that the plaintiff had exhibited his crystal for money, and had, by this means, worked upon the credulity of the public for the purposes of gain. The Court of Exchequer, he went on to say, had, on appeal, in the recent case of *Campbell vs. Spoteswood* (since reported in 3 B. & S., 769, and in the Court below, in 3 F. & F., 421), settled the principle of the law of libel which must govern this action. The principle there laid down was, that the honest belief of the writer in the truth of his statements, and his good intentions in making them public, would not protect him from responsibility for libel, if, in fact, the statements were not true, and were of a libellous character. The learned Judge, after referring at length to *Campbell's* case, told the jury, that if they should be of opinion that the plaintiff had not taken money for the exhibition of his crystal, he was entitled to a verdict, although the defendant may have believed otherwise when he wrote, and may have been actuated in writing by the praiseworthy object of protecting the public from the supposed charletanry of the plaintiff, but, his Honor added, the motives of the defendant, and the circumstances of the case might be looked to in the assessment of damages. The credulity of the plaintiff would not affect his right to redress. It was not for the Court or jury to measure the extent of another's faith, or to decide upon the strength or weakness of his intellect. It was enough to know that the plaintiff was the subject of a libellous charge erroneous in point of fact.

The jury found for the plaintiff and gave him one pound damages, upon which finding the Court refused to give the certificate required to carry costs where the verdict is below a certain sum. The plaintiff did not, therefore, gain much in a pecuniary point of view, by

his action, but he attained what, to him, was equally important, notoriety.

No such suit would have been possible in France, the very nature of the plaintiff's business, being such as would, upon his bringing it prominently before the public, have subjected him to the tender mercies of the Procureur Generale and the penal code. No person is allowed to predict the future, or work miracles outside of the church, in the dominions of his most Christian Majesty, the Emperor. It may be added, that a similar suit in America would almost certainly have been laughed out of Court.

It is impossible not to admire the inflexible impartiality of the learned Judge in carrying out the precedent, upon which his charge was based, to its logical sequence, even in so extreme a case, and the sense of duty of the jury in following his ruling. In the large majority of civil suits between individuals, the English jury perfectly understands that it is a mere form, and that it is its duty to find in accordance with the charge of the Court. Its real independence and importance, are exhibited in criminal trials, and especially those between the Government and individuals for political offenses.

It is rather surprising to find that the belief in judicial astrology still prevails in England. Zadkiel's Almanac is not only the most popular almanac in the British Isle, but the Great Seer himself has his personal converts and followers, one of whom has within the last year come before the public in book form. It is also asserted by one of the leading journals of London, the Saturday Review, that the science (so-called) of Judicial Astrology, numbers among its believers at least one distinguished Barrister, one popular author, and one high dignitary of the church. And we know how many eminent persons of both sexes spiritualism has drawn within its "magic circle!" And how many high dignitaries of the Church of Rome have faith in the yearly miracles which shock the common sense of Europe! "Oh! exclaimed Voltaire over a hundred years ago, what a stupid world this is, and how delightful to be out of it!" Verily, the great Frenchman, if he could again visit the "glimpses of the moon," would not find much improvement after the lapse of over a century. Matthieu de la Drome and Zadkiel have replaced Nostradamus and Lochiel, Andrew Jackson Davis and Home far transcend Mesmer and Cagliostro, and Jo. Smith has thrown Joanna Southcote completely into the shade. Besides, the "base abandonment" of Denmark by the Western powers of Europe to the

spoliation of Austria and Prussia is a repetition, on a smaller scale, of what took place in the dismemberment of Poland, and the devastations of the New World may compare with the sacking of the Palatinate under the orders of Voltaire's own Grande Monarque. The world, to use an American slang phrase, has grown no better fast.

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*Private International Law.**

It is a remarkable fact that for nearly forty years no new book has been published upon this side of the ocean upon the subject of the conflict of laws until now. Upon every other branch of the law books have multiplied, and are multiplying, until it seems that our profession has become afflicted with a mania for book writing; but upon this ground of the conflict of laws, or Private International Law, which mean the same thing, no one has been found bold enough to venture until now, since the celebrated treatise of Judge Story was given to the world.

It was to be expected, therefore, that when a new book upon this subject, fresh from the press by one whose name had become so familiar to us as an author, on an entirely different branch of the law, was announced, we should feel a strong desire to know what new light could be thrown upon it after it had been so profoundly, so learnedly and so elaborately treated by so distinguished an author as Judge Story, whose commentaries upon the Conflict of Laws had held this field without question or dispute so long, that we had begun to consider it as the *suprema lex* on questions of this nature for all time to come, at least in this country.

We think it fortunate that the task of rejuvenating this subject has been undertaken by Mr. Wharton, not only because of his experience and high reputation as a writer, but because of the favorable opportunities, which he tells us in his preface, he has had during a temporary residence in Germany, of studying what he calls "that complex but most philosophic system of jurisprudence which has grown up in Germany for the determination of private domestic relations." He has, therefore, had the advantage of drawing fresh from the fountain the new ideas he has given us upon the subject as those of the most distinguished jurists of the civil law who have given their thoughts to it since the days of Judge Story, and has gathered

*A Treatise on the Conflict of Laws, or Private International Law, including a comparative view of Anglo-American, Roman, German and French jurisprudence. By FRANCIS WHARTON, LL.D., author of a Treatise on American Criminal Law, Precedents of Indictments, State Trials of the United States, etc. Philadelphia, Kay & Bro., 1872.

his knowledge by going to the very source to which all our writers upon international law are principally indebted for their law as well as their reasons; for it is a fact, whether from a distaste for a subject so full of complex and unsettled questions, or from the practical turn of mind which the study of the common law and the everlasting hunt after precedents gives them, that both the English and American lawyers have shown from the earliest times, a seeming aversion to the discussion of so speculative a subject as the conflict of laws must necessarily be, based as it is upon no positive law, but upon the comity of nations. It is, however, to be remembered also, that with them, until within less than a century, there has not been the same occasion for the discussion of such questions; whereas, amongst the continental jurists, such cases of conflict have been constantly occurring for centuries between the laws of their numerous contiguous States and communities; from the discussions growing out of which has been built up a system from which we have been content to adopt nearly or quite all the law we have upon the subject.

Chancellor Kent tells us in his Commentaries, that this question of the effect which was to be given to a foreign law when coming in conflict with the domestic law had not attracted the attention of English lawyers before the time of Lords Hardwick and Mansfield; and that when it was first introduced in Westminster Hall, the only authority referred to was the tract in Huber entitled *De Conflictu Legum*, which formed only a brief chapter in his *Prelectiones Juris Civilis* written in the previous century; nor was there, until Judge Story wrote his celebrated commentaries, either in England or America, any treatise in which the attempt was made to discuss or compile the law upon the subject as it was to be found in the decided cases, or in the writings of the civilians, although previous to that time it had excited considerable attention in the courts of both countries. Since that time a still greater number of cases involving questions of international law, so far as it affected private interests or relations, have come before the courts of both countries, some of which have excited a great deal of interest; and it may be expected that, with the rapid increase of the property and commerce of the world, such questions will greatly multiply in the future, especially in the courts of this country; so that while the subject is, and must be from its very nature, one of the most intricate and difficult which can engage the attention of the jurist, it will always be, at the same time, one of the most interesting and important.

The most casual glance at the book to which we have referred in

the beginning of this article, will show that, however other branches of the law have withstood innovation, this, at least, has been one of progress, and that neither the jurists of our own nor of the civil law have been content in dealing with it to stand *super antiquas vias*. Nor indeed could they have done so in the face of the great changes which have been so rapidly taking place in the condition and circumstances of the civilized world which have necessarily effected such questions.

The book before us opens its subject by telling us that four causes have recently operated to revolutionize much of what was once accepted doctrine in private international law. These are, we are told, first, the surrender by all civilized nations of the old tenet of perpetual allegiance by the general adoption of naturalization treaties; second, the abolition of slavery in the United States and of serfdom in Russia; third, the enormous comparative increase of personal as distinguished from real property, exacting from the Courts the abandonment of the old doctrine that personalty is governed by the law of the owners' domicile, and placing it equally with realty, under the protection and restrictions of the place where it is situated; fourth, a growing inclination on the part of England and the United States to accept, with the rest of Christendom, the rule that in cases of crime, the country of arrest as well of its commission, shall have jurisdiction.

The first two of these changes are known, of course, as a part of the history of the last few years, and their legal as well as political importance in an international point of view, must be readily seen. But we must confess that we were not prepared by our previous reading for the third proposition in the broad terms in which it is announced; and so thoroughly had the old idea that a trial for crime could be had only in the country of its commission been impressed upon our mind that we could but feel some astonishment upon reading the fourth of our author's propositions as above set down.

Each of these important changes comes in for its due proportion of interesting comment in the book before us, to which we must refer those who desire information upon these and other matters of interest belonging the subject of which it treats. The book abounds in valuable information, and we must do its author the justice to say that in our judgment, he has industriously and thoroughly studied his subject, and that he is a bold and decided thinker, and not afraid to combat an idea because it has become venerable by age, when he believes it founded in error. He has an opinion of his own

upon all the questions which he discusses, and never leaves us in doubt what that opinion is, which, as we think, is no small commendation of an author. He is, in short, what a lawyer of the old school, would call an innovator upon this subject of private international law, and it remains to be seen whether the courts of this country will adopt many of his theories upon this subject which he tells us are those of the civilians of the present generation.

We do not propose to review Mr. Wharton's book. We can only express the wish that some one will undertake the task with more time and with better opportunities for it than we have, for the subject is certainly one of great interest, and opens up a wide field. We propose to make his book the occasion of a brief essay, to show what we conceive to be the more modern views upon the extra territorial effect of the law of the domicile upon personal property, as we gather them from the cases; and in doing so we shall have necessarily to inquire how far they sustain the broad proposition of Mr. Wharton, that as to all kinds of property the law of the country *rei sitæ* now governs.

In ancient times, by the common law, property was divided into lands, tenements, and hereditaments, and goods and chattels. The division of property into real and personal was unknown. In process of time, however, leases of land for a term of years were classed as chattels, and were distinguished as chattels real; while other chattels which did not savor of lands were called chattels personal, "because," says Lord Coke, "for the most part they belong to the person of a man or else for that, they are to be recovered by personal actions." And Blackstone tells us that "chattels personal are, properly and strictly speaking, things movable, which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another;" and, as instances, he mentions money, jewelry and garments. Personal property, in fact, consisted almost entirely of such things as could be and actually were, carried about with the person of the owner, or could be easily secreted. And Blackstone also tells us that the amount of the personal estate of our ancestors was so trifling that they entertained a very "low and contemptuous opinion of it," and that "our ancient law books do not, therefore, often condescend to regulate this species of property."

Nothing of an incorporeal nature was anciently comprehended within the class of personal chattels. It was otherwise as to lands or real property, as to which "incorporeal hereditaments" occupied a

conspicuous place in the law from the earliest times. But although there was no such thing as an incorporeal right in a chattel, there were rights of action for pecuniary damages for the infliction of a wrong, or the breach of a contract, as well as to recover money due. Such rights were called choses in action, whilst movable goods were called choses in possession. Choses in action attached strictly to the person, and could not be transferred.

Such was personal property in the early history of our law. It was of comparatively small importance, and its laws were few and simple; whilst real property, being of a fixed and permanent nature, was regarded as of immeasurably more value, and was governed by laws of its own, of the most intricate and abstruse nature. Both species of property, when compared with that of our own time, were of small pecuniary value; but between the importance attached to personal or movable property and the value of real property, there was a difference vastly greater than that which now exists, both because of the comparative insignificant value of personalty, and because of the feudal tenure by which lands were held, out of which grew some of the most important consequences to both the land and the person.

From these circumstances arose the notion which became a fiction of the law, that property merely personal, always attended the person of its owner; while lands, tenements and hereditaments, being fixed and immovable, and of infinitely more consideration, were held from their very nature, as well as from motives of political policy, to have a *situs* of their own, from which they derived their laws and incidents, wholly regardless of the domicile of the owner; whereas, personal property having no such fixed and perpetual *situs*, it was natural, and in a great measure unavoidable, that it should be considered as having a locality dependent upon the pleasure of the owner to be indicated by his domicile, *a quo legem situmque acciperit*.

This law of personal property was strongly expressed by the old maxims *mobilia inherent in ossibus domini*, *mobilia seguntur personam*, *mobilia non habeat sequelam*—expressions which, even at this day, are frequently used to express this rule of law as to personal property, notwithstanding the great increase in its amount, its character and its relative value; and to illustrate what is yet one of the most important features of difference between that species of property and real estate.

Growing out of the same reasons, it was also the prevailing opinion among the civilians that, while immovables were exclusively gov-

erned by the law of their locality, movables were controlled according to the same maxims, by the law of the domicile of the owner, and not by that of its *situs* as to alienation *inter vivos*, its disposition after death, and as to all other questions which might arise in reference to it whenever there was a conflict between the laws of the two. The same unanimity, however, did not prevail among them upon this subject, as is to be found among the jurists of England and of our country; for we learn from Judge Story and from other sources, that from the earliest period there were those among them who inveighed against both the policy and justice of the rule, and now we have the information from Mr. Wharton that it has been universally abandoned upon the continent of Europe, except as to two classes of cases to be hereafter mentioned, and is condemned by Savigny and all the more modern writers upon the civil law, as unfit for this advanced age, both on grounds of policy and convenience.

With us, however, the rule is laid down without qualification by our most eminent text-writers, and we are indeed told that it has so highly commended itself to the common sense of general utility and convenience of all civilized nations as to have become a part of the *jus gentium*: Con. Laws, § 379. And in *Sill vs. Worswick*, 1 H. Black., 690, Lord Loughborough lays down the rule in this strong language: "It is a clear proposition not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality."

In *Black vs. Zacharie*, 3 How., 514, it is said by Judge Story to be well settled "as a doctrine of international jurisprudence that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary." And in this case, the rule was applied to defeat the attachment of a creditor of bank stock, with notice of a previous transfer made by the owner at his domicile, in another State, although such transfer had never been entered or registered in the books of the bank as required by its charter.

The law will be found stated in language equally emphatic and unqualified in nearly all the cases in which it has been applied, and so we commonly find it stated in our text books; and yet it would not perhaps, be going too far to say that there is no principle in the law which stands upon a narrower foundation, or which, in this age, has so little of utility or convenience to support it, except in one or two classes of cases to which we will presently refer. Nor is this opin-

ion unsupported by the current of the more recent cases, as we will hereafter see. It would indeed be remarkable should our courts hold on to and apply, in the changed condition of the wealth and property of the present day, a fiction which, however suitable and useful perhaps in primitive times, would now, in many cases, work the grossest injustice and impair the supremacy which every government should maintain over everything within its territory, both on the ground of public expediency and the private interests of its citizens. Accordingly, we find in this, as in a great number of other cases, the courts have been compelled, in order to keep pace with the changes in all else around them, to abandon, at least partially, the old tenets in reference to the operation of foreign laws within the domestic jurisdiction, both as to persons and property; and hence we find that the old theory that such laws could affect the *status* or condition of the person, has been long since entirely abandoned.

The same condition of society out of which originated the old maxims to which we have referred, also recognized a system of personal, as distinguished from territorial laws. The members of every community were divided into grades or castes, affecting them both socially and politically, and in the same community rights and privileges were accorded to one class which were denied to another. When this condition, whether of lord or peasant, master or servant, freeman or slave, was once fixed by the law of his domicil, it followed the person wherever he went. If a slave, a serf or a villain at the place of his domicil, he was one everywhere, or if a lord there, he was still a lord, and enjoyed all the immunities of the title in any land to which he might travel. This impress of caste or personal *status* we know has long since ceased to follow with the person into other countries where no such distinctions are recognized. The notion has quietly vanished before the advance of civilization. While the air of England became too pure, as was said in the Somerset case, to permit slavery, that of America became too republican to tolerate the claims of nobility. Such diversities made the abandonment of the idea that a man's condition in life followed him everywhere, a necessity. The courts of no government would now think for an instant of extending its comity so far as to administer one law to the slave and another to the lord, because the one was a lord and the other a slave at home. The whole theory has crumbled away before the advanced views in government and law, and although we have come now to regard the very idea as absurd, it may have been a wise thing for past ages.

We do not claim that there is the same reason for the abandon-

ment of the old *mobilia inherent in ossibus* doctrine. There may yet be cases in which it may be resorted to as a fiction. We can imagine but few such cases; though we remember the maxim *in fictione legis semper subsistit equitas*, and can not say but that this fiction may sometimes be found useful. We see it so stated in some of the cases but they do not explain or illustrate how this may be. All we should say would be, that being a pure fiction in a thousand cases out of a thousand and one, it should be resorted to only in exceptional cases and not as a rule of general application in the present changed condition of property.

We proposed, however, not to reason ourselves upon this topic, but to refer to the more recent cases involving the question, and to show from them how the rule had been receded from or modified in recent times. But before doing so we will briefly refer to the two classes of cases to which we have already alluded, and to which the rule that, as to personalty, the law of the domicile of the owner governs to the exclusion of that of the country of its locality, is yet universally held to apply. These are cases as to the rights to such property, which spring from MARRIAGE and SUCCESSION.

As to the latter, there can now be no question, in countries where the common law prevails, although it was formerly a matter of much contest; and it may be laid down as a rule of universal recognition that the law of the domicile must control the distribution of the personal effects of the intestate wherever those effects may be located. This law of personalty has been so long accepted everywhere that it may now be considered as a part of the *jus gentium*. It has prevailed on the Continent of Europe for several hundred years, and in England for a hundred years or more. The earliest case on the subject is that of *Pipon vs. Pipon*, in *Ambler's Reports*, decided by Lord Hardwick, in 1743, which has been followed by an unbroken series of decisions by the highest courts of Great Britain to this day; and in this country the cases are equally uniform from the earliest judicial decisions down to the present time. 3 Dallas, 377; 14 How., 424; 2 McCord Ch. R., 260; Story's Con. Laws, §480 *et seq.*

Among the jurists of the civil law there has not been the same unanimity upon the subject as we find in England and America since the decision of Lord Hardwick. There seems always to have been amongst them a strong array in both ability and number against the application of the domiciliary law in such cases, as will be seen in the chapter of Judge Story on this subject, in his commentaries; but we are now told by Mr. Wharton, that the English and Ameri-

can view of the question has, in late years, gained ground with them, and may now be considered as their settled law.

This rule of law may lead to some very curious results, as we can very readily see. Cases have indeed occurred, showing the anomalies to which it may lead. Such was the case of *Balfour vs. Scott*, 6 Brown's Par. R., 731, in which it was held that because a person died domiciled in England his personal estate in Scotland belonged unconditionally to his English next of kin, though the Scotch law provided otherwise. So a will of personal property, if good by the law of the domicile, is good everywhere, even though it could not be sustained by the law of the country where the property is situated. So a man may make his will in one State in conformity to its laws and may, by removal into another, as effectually revoke it as to his personal property, as though he had burnt it, though not so intending; and without another will executed according to the law of his new domicile might die intestate as to all such property everywhere. So it has been held that a bequest by an English testator to the child of A. in France could not be claimed by the child if illegitimate by the law of England, because by that law he would be *nullius filius* though legitimate by the French law. The next of kin, if legitimate by the law of the domicile, will succeed to personalty though illegitimate by the law of its *situs*; although the converse of this would be the law as to realty. So that as to the latter, the will, though good as to the land within the country of domicile, might be void as to that without, and the legitimate heir by the law of domicile may be bastard and incapable of inheriting by the law of the *situs*; and a person may be heir, and take by descent or not, according as the land may be in this or that country; so that the two species of property, though in exactly the same place, may be controlled as to descent and distribution by the laws of different countries, and the son may be legitimate as to the barn, and bastard as to the grain within it, or *vice versa*.

The theory is that all personalty must come at last for distribution to the forum of the principal administration upon the intestate's estate, which is always the place of his last domicile. Other governments may insist, for the protection of its own citizens, that the property within its jurisdiction shall be there administered through resident ancillary or auxilliary administration so far as may be necessary to sell, and appropriate it to pay debts which may have been contracted there by the decedent, or which his estate may owe there. But further than this it can have no interest in the personal

assets; and when this is accomplished, whatever surplus remains in the hands of the ancillary administrator belongs of right to the administrator of the domicile, to be there paid out to creditors or distributed among the next of kin.

Besides the incongruities above alluded to as sometimes resulting from this rule of distribution according to the law of the last domicile, other very embarrassing questions have arisen from the theory; as where for instance, the estate of the intestate is insolvent but has abundant assets within the jurisdiction of the ancillary administration to pay all its creditors there and where priority is given in the country of the ancillary administration to certain classes of debts which have no such priority by the law of the last domicile. In such cases shall the debts of the domestic creditors be paid in full, and shall the assets be paid out according to the priority given by the law of ancillary jurisdiction where the assets are, or *pro rata* according to the law of the domicile? Judge Story answers this last question by saying that it is well settled, at least in England and the United States, that the order of paying the debts must be according to the law of the particular country where they are administered and not according to the law of the last domicile. The first question, however, he leaves undetermined. But it would seem that if the *lex rei sitæ* is to govern as to priority among different creditors, and as to the mode or order of payment, it would be consistent in the courts of the ancillary jurisdiction to treat the administration there as entirely independent of the domicile, at least for the purpose of paying its domestic creditors. In analogy too, to the effect given to foreign bankruptcies, which will hereafter be referred to, we think there could be no question but that in the case of insolvency of the estate the debts within the country of the ancillary administration should be paid in full when there are abundant assets there. And in the language of a recent case which, we think, settles this question, "personal property as against creditors, has locality, and the *lex rei sitæ* prevails over the law of the domicile with regard to the rule of preferences in case of insolvent's estates." Besides, the delay and inconveniences resulting from any other course would be a powerful argument against it.

Aside from theoretical reasoning, the rule that all questions as to succession to personal property are to be decided by the law of the last domicile of the intestate, has no doubt much to commend it in policy and convenience. When we consider the ambulatory nature of that kind of property, it will be conceded that there should be

some one settled and recognized law by which it should be governed and disposed of when left without the care of its owner by his death, instead of being subjected to a variety of laws depending upon the chance or accident of its locality, when that event may occur; and of course, no law could be preferred for this purpose to that of his last domicile which he must be presumed to have known, and by which it may be inferred, he desired it to be controlled after his death. And but for this rule the administration and distribution of a man's assets after his death might be involved in inextricable confusion, and numbers would perhaps be deterred from engaging in extensive commercial ventures which might leave their fortunes scattered through a variety of countries, to be controlled in the matter of succession and distribution by as many different, and perhaps, conflicting laws, and probably to pass to undesired heirs. But notwithstanding this law of succession has really so much to commend it, we have seen that even it has its exceptions, showing the strong tendency at the present time to escape from the old dogma, that personal property has no locality.

Marriage, however, by the common law, effects a more universal transfer of personal property than any other contract, either express or implied. It has been held in England that marriage is an assignment of the personal estate of the wife at common law; operating without regard to territory all over the world, and such seems to be the settled law there; and, although a Court of Equity in England will not generally assist the husband to get possession of the wife's equitable choses in action except upon condition of a reasonable settlement upon her, yet if it appear that the husband and wife are domiciled in another country, by the laws of which the husband is entitled to the property without such provision for her, the Court will allow the money to be paid to the husband unconditionally. 1 Aus., 63; 4 Eng. Ch. R., 257; 3 Vesey, 321; 12 Bean., 534; 5 De G., M. and G., 278; 2 M. and K., 513.

This is recognized as a universal principle of international law in Tennessee in the cases of *Kneeland vs. Ensley*, Meigs R.; and *Layne vs. Pardee*, 2 Swan; and independently of statutory provisions, we have no doubt the law would be so held without question in all those States in which the common law prevails: Con. Laws, § 186. From this also some very curious consequences may follow, as from the like rule in regard to succession. If, for instance, the husband and wife live in Louisiana; having personal property in Tennessee, which was before the marriage, the property of the wife, it would, as be-

tween them, be governed by the law of community, that being the law of Louisiana, while as to the rights of third persons, it would, in most respects, be subject to the Tennessee law.

Of course, where there is a valid marriage contract or settlement, that will furnish the law as to the marital rights of the husband, in all the personal property of the wife, wherever it may be situated, unless there be something in the contract or settlement contravening the policy of the laws or government of its *situs*. In England, few marriages where any considerable amount of property is involved, are contracted without such settlement, and consequently the question as to the extent of the marital rights of the husband by the rule of international law has not very often arisen, but with us such settlements are less frequent, and the necessity, therefore, oftener arises to apply the law independently of contracts, and hence its greater importance with us.

This principle of international law, like that of the common law, which makes marriage a gift to the husband of all the personal effects of the wife, is, perhaps to be traced to the circumstances of ancient rather than of modern times. The old theory was, that by the marriage, the wife surrendered her individuality, and her very existence became merged in that of her husband, and as, in contemplation of law, her movables always attended her person, they came with her person under the absolute dominion of the husband, especially as by the marriage, he became liable for all her debts. And, however time and change of circumstances may have changed our ideas in regard to the justice of the fiction, the rule itself has been found so convenient, and has been adhered to for so long as to have become a part of the law of nations.

Accordingly we find it prevailing also in countries governed by the civil law. After some diversity of opinion, which may be seen by a reference to the commentaries of Judge Story on the Conflict of Laws, §143, *et seq.*, and from which it appears that the rule is maintained by the great weight both in number and ability of their distinguished jurists and writers, both upon the grounds of expediency and implied contracts, it has come now, as we learn from this book of Mr. Wharton's, to be universally recognized and commended by the Courts and jurists of the Continent. Indeed, we are told by him, that Savigny and others of the most eminent of the more recent writers of that class, contend that the law of the domicile of the marriage should apply to the real as well as to the personal property of the wife owned by her at the time of the marriage, and that so

highly has this view of the law commended itself that it has been adopted into the Codes of some of the European States. But owing to the greater jealousy with which every nation controls its landed property, and so long has the *lex rei sitæ*, been regarded as the law of all immovable property that this innovation it seems has not met with general acceptance, and so far as England and America are concerned, we must consider the contrary rule as too firmly settled to be questioned.

Questions have frequently arisen in cases of this kind as to what shall be considered the domicile of the parties by the law of which the marital rights of the husband shall be governed. It may be said to be now settled that neither the law of the place of the marriage contract, nor of its celebration, controls, but that of the matrimonial domicile, about which there can be no question, if the domicile of both parties be the same at the time of the marriage. But where this is not the case, then the law of the domicile with a view to which the marriage is had, shall govern, which of course, will be that of the husband unless the marriage be contracted with a view to a different one. In other words, the intention of the parties as to the domicile at the time of the marriage, consummated by residence there, fixes both the domicile and the marital rights of the parties by both the civil and common law: Con. Laws, §§ 193, 198; 2 Par. on Con., 599; Ford's Curators *vs.* Ford, 14 Martin; Kneeland *vs.* Ensley, Meigs' R., 620.

But when the matrimonial domicile has been changed, by what law shall the marital rights of the husband be determined, as to property acquired before and after the change? Upon this subject there has been a great diversity of opinion amongst foreign jurists, as well as in countries governed by the common law. The great body of the foreign jurists hold that the law of the matrimonial domicile continues to apply, notwithstanding the subsequent change, founding their theory upon the doctrine of tacit contract, which, being once entered into by the marriage, is of legal obligation during the whole existence of the coverture, and extends itself permanently over the marital relation everywhere, and cannot be displaced or altered by change of domicile, and to this effect, says Mr. Wharton, are the recent decisions of the French and German Courts, and the concurrent opinion of the most distinguished of the writers upon the civil law. And the law of England so far as it can be gathered from decided cases, is supposed to be in harmony with this view. Philm. In. Law, IV, 314; 21 Beavan, 97; De Gex, M. and G., 278.

The only reported cases so far as known in our American Courts, show opposite and conflicting views upon the question. In Kentucky, in the case of *Kendall vs. Coons*, 1 Bush., 530, it was held that where the property of the wife was secured to her by the law of the matrimonial domicil, (Louisiana,) by a legal lien on the estate of the husband, by the acknowledged law of comity, that right and lien were as ubiquitous as the persons themselves and followed them wherever they might afterwards settle. And, in New York, in *Bonati vs. Welch*, 24 N. Y. R., 157, it was held that where by the laws of France, the former domicil, the wife was entitled to priority of payment out of the assets of her deceased husband for a debt owing her by him, the same law followed the husband to that State, and gave a lien there upon his estate, though he had many years before abandoned his wife in France, become a naturalized citizen of the United States, and had died domiciled in New York.

In these States, therefore, it would seem that the law was settled in accordance with that of France and Germany. Several of the State Courts have, however, taken a different view of the question. In Louisiana it has been held that when the husband's domicil shifts, the applicatory law shifts with it, as to the property acquired after the change, and it was decided accordingly that where a married couple remove from a State where the common law prevails, to Louisiana, where the law of community holds, the marital rights in all property subsequently acquired must be governed by the latter law, but that as to all property acquired before such removal, the law of the matrimonial domicil must prevail. 4 Martin, 645, 9 Id, 217.

Such too, has been the holding of the Supreme Court of Tennessee in the case before quoted, of *Kneeland vs. Ensley*, Meigs' R., 620, in which the propositions are also laid down, that in case there is no determinate domicil of either husband or wife at the time of the marriage, the marital rights of the husband are to be governed by the *lex loci contractus*, in case of different domicils, by that of the husband, in the case of a previous agreement as to domicil, which actually becomes such after the marriage, then by the law of that place; and in case of a change of domicil, by the law of the new domicil as to all the wife's movables acquired after the change in the place of the new domicil. These conclusions are, in that case, thought to be clearly deducible from Story's Con. Laws, §§ 143, 189, and are considered settled.

This last proposition is to be found in section 187 of the Conflict of Laws, as the conclusion of the eminent author, but it will be found

prefaced in section 183, by the remark that it is laid down as one not universally established or recognized in America, though having much of domestic authority for its support.

So far, however, from being "settled," we have seen that the great weight of authority is the other way; and so far as those States are concerned in which the question has not been judicially passed upon, it may be considered an open one. It might also be added that since Judge Story wrote his Commentaries, the preponderance of authority, both of courts and writers, upon international law against his position has greatly increased, notwithstanding the great weight of his opinion.

The argument that the marital rights of the husband are changed by change of domicil, is based upon the theory that the law which fixes those rights is what is known amongst civilians as a *real* law, or one which, according to their distinctions, relates to things only; and hence that the right attaches and becomes fixed only when the property is acquired, and not before; while on the other hand, it is argued that the right of the husband arises from a tacit implied contract, which is supposed to spring from every marriage, which, of necessity, must be the law of the matrimonial domicil, and must continue, therefore, during its whole existence, whatever other domicil may be afterwards acquired.

Whatever may be said of the former view of this question on the ground of its seeming justice, there can be no doubt but that the latter has the advantage on the ground of convenience as well as in reason. If the marital rights of the parties are to be made to depend on the law of the domicil, as it may be changed from place to place without reference to any supposed marital contract, we must necessarily claim for the laws of the original, and of each subsequent domicil, an extra territorial force, which they can only have by comity; and it would seem unreasonable to place rights so universal and so well settled as to have become, as we have said, a part of the *jus gentium*, upon the ground of mere comity. And on the score of convenience and utility it would certainly be preferable that such rights throughout the continuance of the marital relation should be made to depend upon the laws of some one country, which may be easily known, rather than upon a variety of laws changing as the parties may shift their domicil from one locality to another; otherwise, to arrive at those rights, we should have to inquire not only when each particular article of property was acquired, but when the domicil was changed, and the law of the country where the dom-

icil was when the acquisition was made; and it might well happen that marital rights in the property owned by the parties might vary as to each separate piece, as it happened to have been acquired at this or that time, or at this or that place, thus involving the title to property thus acquired, both as to the facts and the law in the greatest confusion.

Indeed, it would seem more consonant with reason to rest this whole subject of marital rights and succession upon the ground of contract and intention, than upon the unsatisfactory one of the *lex domicilii*, and to say that when parties marry it is the universal law of Christendom, in the absence of express contract or settlement, that they silently contract with reference to the law of the domicile of the marriage, as to their marital rights in property possessed by them at the time, or to be thereafter acquired during the coverture, no matter where or when; and that when a man dies intestate, the law everywhere presumes his wish and intention to have been that the law of his domicile should control the succession to his personal estate. And it may admit of serious question whether there is now, when the great disproportion between the value and importance of real and personal property has ceased, any ground for keeping up the wide distinction between movable and immovable property which formerly existed in questions relating to succession and marriage; and whether on the whole, the opinion of those jurists who hold that marriage is a gift of every species of property, is not the most sensible as well as preferable on the score of uniformity and simplicity.

But whatever may be the better reason or the weight of authority upon these questions growing out of marriage and succession, certain it is, that the law of the domicile so far as it may effect property extra-territorially, has its fullest application in these two classes of cases; and it remains to be inquired to what extent it will be recognized and applied in other cases where it comes in conflict with the law of the country of the locality of the property, or with the policy of its government. And certainly no question of more interest or importance can engage the attention either of the student or of the practical lawyer, in a country like ours, composed of so many States, each with its own system of laws, from which it must necessarily result that questions of this character will frequently arise and increase with time, not only in number but in importance.

It must be observed in the outset that it cannot be denied but that within the last quarter of a century, owing to the vast accumulation of monied capital, the infinite variety of ways in which it is invested

or employed, and the rapid increase in the value and amount of all species of movable property, both courts and jurists have been compelled to recede largely from the doctrine of which we are speaking as formerly applied. Since the time of Judge Story, and especially in very recent years, the subject has attracted much attention, both in our own and foreign countries, and we think an examination of the cases will show that the views of Judges as well as of judicial writers have undergone a very great change, both as to the policy and convenience of the rule, and that there is manifest disposition, on the part of our courts, to evade its application whenever an excuse can be found for doing so; and, in fact, that when applied at all, it is done as an exception under the peculiar circumstances of the case, as other fictions of the law are sometimes applied. Perhaps it would not be going too far to say that the conviction is rapidly gaining ground, if it has not already become general, that in reason and common sense, whatever may be the technical rule of law, all property should derive its law from the country of its *situs*; and such, we are told by Mr. Wharton, is the universal concurrence of the continental writers of Europe of more modern date, who both in theory and practice, have discarded the old maxims to which we have referred, and have put movables and immovables as to the applicatory law upon the same footing, except as to succession and marriage.

None of our cases have gone to this length; but the later ones while admitting the rule, treat it rather as a fiction to be applied only upon principles of comity whenever it may be done without detriment to public interest or private rights. This comity has its foundation only in mutual interest and utility, in a sense of the inconvenience which would otherwise result, and from a sort of moral necessity, to do justice in order that justice may be done to us in return; and they hold that this principle of international law always yields when the laws or the policy of the State where the property is located, has prescribed a different law in regard to it from that of the State where the owner lives, or when it becomes necessary for the protection of the rights of its citizens.

Hence we find that the rule will always yield when it becomes necessary for the protection of the creditors of the foreign owner in the domestic domicil. And upon this ground it was never questioned but that the assets of a foreign intestate or testator could not be collected and controlled by the foreign executor or administrator, but that it was necessary to have a domestic administration of those

assets in order that such assets should be appropriated as far as was necessary to the payment of the creditors of the decedent's estate within that jurisdiction. This was always a palpable exception to the rule that his personal effects should be governed by the law of owner's domicile, but was required upon principles of common justice. And so far was this policy carried that governments everywhere, as a precautionary measure, and without any inquiry in regard to the indebtedness of the estate, and even without any action or petition of the creditors, actually impounded its assets within its jurisdiction by laws prohibiting suits by the foreign personal representative, or any other exercise of authority by him over such assets.

So in cases of foreign bankruptcy and insolvency, it was at an early day held by our courts, contrary to what seems to be the law of England, that the foreign assignee acquired no right to the property of the bankrupt in another State or country as against his creditors there; thus establishing an exception which at once destroyed the universality of the rule in this country. And, although not approved by either Judge Story or Chancellor Kent (Con. Laws, § 403, *et seq.*; *Holmes vs. Remsen*, 4 John. Ch. R., 460,) it was approved and followed by Chief Justice Marshall in *Blane vs. Drummond*, 1 Brock R., 62, and *Harrison vs. Sterry*, 5 Cranch, 289; and has ever since been the established law with us. Nor can we well see how a mere technical rule of law could be applied to deprive the domestic creditors of the foreign bankrupt of any rights or remedies given them by their own laws against his property within their reach without a perversion of justice. The courts of this country have, therefore, refused to admit the right of the foreign assignee to the assets within the domestic jurisdiction whenever the assertion of that right would conflict with the claims of domestic creditors, and have gone no farther than to acknowledge his right to sue for them when there is no such conflict. It should be observed, however, that even this latter right seems to be denied in some of the best considered cases; and no good reason is seen why he should be allowed this right, when it is denied to the foreign administrator, and when it seems so entirely inconsistent with the decisions which are uniform, that a foreign discharge in bankruptcy can not be pleaded as a defense to an action for debt. See *Hunt vs. Jackson*, 5 Blatch. C. C. R.; *McMillan vs. McNeill*, 4 Wheat., 209; *The Watchman*, Ware's R., 233; *Green vs. Sarmiento*, 3 Wash. C. C. R., 17.

The same exception as exists in cases of administration and bankruptcy is made in every case in which the transfer of the property is

involuntary or compulsory, or takes place by operation of the law of the foreign domicil, because the law which compels the transfer cannot operate extra-territorially; and so it has been held in a number of cases. *Remsen vs. Holmes*, 20 John R., 258; *Owen vs. Miller*, 10 Ohio, (N. S.) 136; 6 Binn, 353.

A still more important exception is in cases where by the law of the *situs* of the property the law of the domicil is precluded, or where the law of such *situs* is in conflict with the domiciliary law. In such cases, it seems that there can be no question but that the former must prevail. This is admitted by Judge Story in sections 390 and 406 of his Commentaries, and is established by a great number of adjudicated cases. It is well illustrated by the recent case of *Guillander vs. Howell*, in the Court of Appeals of New York, 35 N. Y. R., 657, in which a debtor, a resident of New York, had made an assignment of personal property, a part of which was situated in New Jersey, by whose laws such assignment was void. It was held that the assignee could not recover the property in New Jersey from the attaching creditors, although the assignment was valid by the laws of New York, and had been made before the attachments. See also *McCullom vs. Smith*, Meigs' R., 353.

It is also conceded that all property, whether movable or immovable has locality so far that it may be impressed with any character which the government of the country of that locality may choose to give it. This indeed, would seem to be an inherent right of sovereignty. And hence in each case which may arise as to the application of the law of domicil, where the domicil may be in one State and the property in another, the first inquiry should be, how the property stands affected by the law of its *situs*. If that sovereignty has imparted to the property the character of realty, or if it has enjoined or prohibited the application of the rule in question in the particular instance, or as to the particular kind of property within its territory, the rule must yield to the superior force of its law. *Con. Laws*, § 390; *McCullom vs. Smith*, Meigs' R., 620; *Jones vs. Marable*, 6 Hume; *Layne vs. Parden*, 2 Swan, 234. And it seems that the same effect is to be given to the judgments and decrees of the courts of such sovereignty fixing the *status* or quality of property within its jurisdiction.

Judge Story, however, while he admits these exceptions, expresses the opinion that the law which makes the exception must be a positive prohibitory law of the State in which the property is situated. He says that "until such legislation is positively made and interposes

a direct obstruction, the true rule is to follow out the lead of the general principle that makes the law of the owner's domicile conclusive upon the disposition of his personal property." And again he says: "How far any court of justice ought, upon its own general authority, to impose any such limitation independently of positive legislation, has been thought to admit of more serious question." By which we are to understand him to mean that the law which makes such an exception must be one expressly made by the law-making power in a State as distinguished from its customary or common law, as expounded or settled by its courts. But with all deference to such an authority it would seem difficult to find reasons for such a distinction, as the courts only decide what the law is, and the law-making power enacts what it shall be, together making its system of laws, all of which are equally obligatory. We find, accordingly, that this distinction has not been acted upon in the decided cases, and must now be considered disapproved.

The most noted of these cases arose in the State of Louisiana, in which State, we may incidentally observe, from the peculiarity of her laws perhaps, differing widely as they do from those of the other States, more questions have arisen involving a conflict of laws than in any other of our States, and in which, too, we may add, these questions have been argued with an ability and thoroughness rarely equalled, as was to be expected of a court composed of Judges trained in the school of the Roman Law, from which has been derived, we may say, the whole volume of the law upon this and kindred questions of international jurisprudence.

Commencing as early as 1812, with the case of *Norris vs. Mumford*, 4 Martin's R., 20, and coming down through the reports of that State to 1865 (Fall *vs. Dardenne*, 17 La. Ann. R., 236,) a number of cases will be found holding that sales and transfers of personal property in that State not conforming to the laws of Louisiana are invalid as against subsequent attaching creditors. But the leading case upon the question, and the one which seems to have been most fully argued and carefully considered, is that of *Olivier vs. Townes*, in 14 Martin. The whole case turned upon the necessity for delivering to complete the transfer, such delivery being required by the Roman Law, which prevails in Louisiana. The case was that of the sale of a ship, then in New Orleans, by her owner, in Virginia, the place of his domicile. Before delivering, however, the ship was attached at New Orleans by the creditors of the vendor. The learned Judge who decided the case, while admitting that the alienation of movables

ble property must be determined by the rules, usages and laws in force where the owner's domicile is situated, nevertheless held that so far as concerns creditors, it is to be governed by the law of the country where the property is situated. And in its opinion the court held that such a delivery as is required by the laws of Louisiana is necessary for the protection of purchasers and creditors, and to avoid the impositions to which the opposite doctrines would lead.

Judge Story admits that there is great force in the reasoning of this opinion, and says that it can not be justly open to the reproach of being founded upon a narrow or selfish policy, but proceeds to doubt whether any court should interpose such a limitation independently of positive legislation, and objects to the conclusion arrived at because it contravenes the general rule, and aimed a direct blow at the soundness of its policy. And, perhaps, no cases ever elicited from writers on international law more criticism and comment than these Louisiana cases. They have been often condemned as unsound, and as often approved by able Judges and writers, according to their various views, as to the wisdom, policy and binding force of the doctrine of the *lex domicilii* in its extra-territorial application; but it will be undeniable, upon an examination of the later decisions, that the opinion which supports them has been steadily gaining ground, and we think it may be safely said, that they would now be approved and followed by the courts of all those States in which a contrary rule has not been already established.

The opinions of the Judges in the case of *Green vs. Van Buskirk*, which came twice before the Supreme Court of the United States, reported first in 5 Wallace, and again in 7 Wallace, strongly countenance this belief. No authority could be stronger or a more powerful vindication of the doctrine of the Louisiana cases. The facts were substantially the same as in *Olivier vs. Townes*. One Bates, who lived in New York, owning certain iron safes in Chicago, executed to Van Buskirk a chattel mortgage of them on the 3d of November, 1857, to secure a debt owing by him to Van Buskirk. On the 5th of the same month, Green, who was also a creditor of Bates, caused an attachment to be levied on the safes, got judgment, and had the safes sold. The mortgage had not been recorded in Illinois, nor had possession been delivered under it, nor did Green have notice of it until after his attachment had been levied. Green, Van Buskirk and Bates were all citizens of New York. Van Buskirk afterwards sued Green in New York for taking and converting the safes, and recovered judgment. The case was taken, by Green,

to the Supreme Court of the United States, and that court held that the right acquired by Green under his attachment process was superior to that of Van Buskirk under his mortgage, though the mortgage was of prior date, and was valid by the New York law. The Judge who delivered the final opinion of the court in the case, used the following language: "The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. If between the parties without delivery the sale is valid it has no effect on third persons, who in good faith, get a lien on it." The mortgage was not completed by the delivery of the property as required by the *policy* of the law of Illinois, and, therefore, vested no right as against any third person, who, without notice had purchased or levied an attachment, although by the law of New York, no such possession was required to complete the title of the mortgagee.

This holding is in exact accord with the Louisiana cases, and coming from a court of such distinction and authority, can not fail to carry with it great weight. It was elaborately discussed, and maturely considered, as we infer from the two reports, and decided with but one dissenting opinion.

In *Skiff vs. Solace*, 23 Vermont R., the same question arose and was decided in the same way, the Vermont law, like that of Illinois, requiring a transfer of possession in every sale or mortgage. There too, the mortgage was made in New York of chattels in Vermont. It was undoubtedly good by the law of New York without change of possession; but the Vermont Supreme Court held it void in Vermont as against creditors of the mortgagor, though the property had been brought into that State only for a temporary purpose.

But we suppose that full effect would have been given in the above cases, to the mortgages as against the attaching creditors, had it not been for the necessity of the transmutation of possession by the laws of Illinois and Vermont; and should the same question arise under the same circumstances in any of our States in which such change of possession is not required, the decision would, we doubt not, be different. Suppose, for instance, that a citizen of New York should mortgage or sell his personal property in Tennessee without any change of possession but *bona fide*, and for a valuable consideration, and that his creditor in Tennessee should afterwards attach the property without notice of such mortgage or sale. The sale or mortgage would be valid by the New York law, and our law not requiring a transfer of possession, a complete title would have become vested

in the mortgagee or purchaser to which the subsequent attachment would have to yield; but if the sale or mortgage had failed or been lacking in anything required by the Tennessee law, then the principle of these cases would apply, and the attachment would prevail. And if we suppose, on the contrary, that the sale or mortgage failed to comply in any essential particular with the New York law, and was therefore void by that law in New York, it would nevertheless be valid in Tennessee if in compliance with its laws according to the reasoning of the opinions in these cases. In fact, if the law of these cases be sound, this would necessarily be so. It would be absurd to say that the transfer must be valid by the laws of both States. There would be many cases in which that could not be, and these and the like cases hold that it *must* be valid according to the country *rei sitæ*. And so it should be, as we think, upon principles of policy, convenience and justice.

The following cases may be cited in addition to those already referred to on this point: *Johnson vs. Parker*, 4 Bush, (Ky.), 149; *Smith vs. Smith*, 19 Gratton, 545; *Dunlap vs. Rogers*, 47 N. Hamp., 287; *The Watchman, Ware's R.*, 233; *Felsh vs. Bigbee*, 48 Maine, 9.

Two conclusions may be set down as fairly deducible from what has been said and from the authorities cited:

1. That a sale or assignment of personal property, no matter where made, will not be upheld as against purchasers or attaching creditors without notice, in another State, when such sale or assignment is not valid by its laws, though made according to the law of the place of sale, and good between the parties.

2. That the converse of the above rule is also true, and when such sale or assignment is valid by the law of the *situs* of the property it will be held valid as against third persons whether with or without notice, and whether valid or not by the law of the place of sale or assignment.

The last proposition is indeed nothing more than a corollary from the first. The assumption in all the cases is, that had the transfer been good by the law of the *situs* of the property it would have been sustained, and it was ignored because it did not conform to that law. Indeed those who have gone farthest in support of the domiciliary law, have admitted that a compliance with the *lex rei sitæ* was sufficient, no matter what might be the law of the domicile. Judge Story states the law to be "that a transfer of personal property, good by the law of the owner's domicile is good wherever else the property may be situated." "But," he adds, "if he should direct a sale of it

or make a sale of it in a foreign country where it is situated at the time, according to the laws thereof, the validity of such sale would scarcely be doubted."

In this connection two cases deserve notice as directly contravening the last of these conclusions. The first is that of *Mason vs. Alexander*, 2 Iredell, 388: A father who lived in South Carolina, had loaned his married daughter who lived in North Carolina, a slave, and had given her possession. Afterwards the father, at his South Carolina domicile, made a deed of gift of the slave to the daughter, with limitations over to her issue after a life estate to her. This deed was sent to the daughter and delivered to her in North Carolina. After her death, the question arose whether the limitations in the deed were valid, and the Supreme Court of North Carolina held that they were not, because, by the law of South Carolina, no such limitations could be engrafted upon a transfer of personal property. The common law rule upon that subject having never been changed in South Carolina; and that although the law in that particular had been changed in North Carolina, and by its laws these limitations were perfectly good, they could not be sustained there, even as to property in that State when not valid where the deed was made. The reasoning of the Court was, that as the father lived in South Carolina it must be presumed that when he made the deed he had in his mind the South Carolina law, and that as the law by which he was presumed to have intended that the deed should be governed did not authorize such limitations of personal property they could not be sustained; but it was intimated at the same time that if it could have been shown that he had in his mind the North Carolina law, and made the deed with reference to that law, the limitations would have been good!

The other is the case of *Allen vs. Baine*, in 2 Head's R., 100, which is the only reported case in Tennessee in which the law of the domicile, as opposed to that of the *situs*, has been discussed and applied to personalty. As stated in the opinion of the Court, the case was this: Baine, a resident of Philadelphia, being entitled under the will of Montgomery Bell, late of Davidson county, Tennessee, to a legacy, assigned it, while in the hands of the executors in Tennessee, to a trustee for the benefit of certain creditors. This assignment was dated the 30th March, 1857, was acknowledged in Philadelphia before a commissioner for Tennessee on the same day and forwarded to the executors, who filed it for registration in Davidson county in June following. The parties lived in Philadelphia, but

the executors and the fund were in Tennessee. In October, 1857, Allen filed his bill in the Chancery Court in Davidson, and attached the legacy as a creditor of Bain. The suit was defended by the trustee in the assignment and by the executors, who set up these facts in their answer; and the question in the case was as to the validity of the assignment as against the attachment. It was held by the court that the general rule was that the alienation by assignment or otherwise of personal property must be controlled by the laws of the owner's domicile or place of transfer, no matter where the property was situated, and that therefore the validity and operation of the assignment must be tested by the laws of Pennsylvania. That this rule extended to all the requirements of the law of Pennsylvania to make it binding, and that whatever defects would avoid it there would follow it everywhere. That among these requirements of the Pennsylvania law was one that such assignments to be good against creditors should be recorded, and that as this assignment was never recorded there it was null and void as against the attaching creditor in Tennessee, although it was admitted to be valid if tested by the laws of Tennessee, by which no such recording was required.

Would there not be as good reason for holding that the attachment proceedings should have been conducted according to the Pennsylvania law? And if the owner of this property had lived in a State by the law of which no proceeding by attachment could be had, would not that and not the law of Tennessee have been the law of this property according to this decision? Or suppose the law of the domicile of the owner required certain formalities in sales under legal process, why must not his property be sold here with the same formalities? No one would of course contend for such conformity in legal proceedings to the *lex domicilii*. And why may not the parties assign by the same law by which the assignment or sale would be made for them if the law's agency were invoked? In the latter case the law of the forum asserts its supremacy regardless of the domicile of the parties; in the former, they make their own selection. As between themselves the assignment may be made according to the law of the place where they may be, or any other law they may agree upon; but as between themselves and third persons whose rights may intervene, it *must* be good by the law of the *situs* of the property. But in this case the Court took the ground that the law of Tennessee could not be noticed in considering the question before them, and its decision turned entirely upon the Pennsylvania law.

Now we submit that this is going a step beyond anything to be

found in any of the cases or law books. The most for which the advocates of the application of the *lex domicilii* in such cases ever contended was that if the transfer were good by the law of the domicile, it would be good everywhere; not that if it were bad by that law, it would necessarily be bad everywhere. On the contrary, as we have before said, Judge Story, who was the warm eulogist of this theory, admits that in most cases it would be safest to conform to the law of the *situs* of the property. "But," says he, "it does not follow that a transfer made by the owner according to the place of its actual *situs*, would not as completely divest his title, nor even that the transfer by him in any other foreign country which would be good according to the law of that country, would not be equally effective, although he might not have his domicile there. * * * * *

In the ordinary course of trade with foreign countries, no one thinks of transferring personal property according to the forms of his own domicile, but it is transferred according to the forms prescribed by the law of the place where the sale takes place," § 384. If the parties, while domiciled in Pennsylvania, had come to Tennessee, and there executed the assignment according to its laws, could there be any question as to its validity because they did not live in Tennessee? No one, we suppose, would contend for such a proposition. If, in such case, it be conceded that the assignment would be valid if it conformed to the Tennessee law, the doctrine of this case would be simply that so long as the parties staid at home they must conform to the law of domicile, but if temporarily away it ceased to be obligatory.

Nor as it seems to us, can this decision be defended upon the ground that the subject of the assignment was a chose in action; for the assignment of choses in action forms no exception to the rule that an assignment of personal property good by the law of its locality, is good everywhere. It has been held that debts payable generally follow the person of the creditor wherever he may go, and that an assignment of them, according to the law of the place where made, will be valid, no matter what may be the law of the domicile of the debtor. This is upon the assumption that debts not payable at any specified place are to be paid to the creditor wherever he may be, and have an imaginary locality depending upon that of the owner. *Guillander vs. Howell*, 35 N. Y. R., 657; *Speed vs. May*, 17 Penn. State R., 17; *Caskie vs. Webster*, 2 Wall. Jr., 131. Even this, however, is denied elsewhere, and it has been repeatedly held that the assignment of debts, no matter how evidenced to be complete, must be

according to the law of the residence of the debtor, and may be attached even after an assignment elsewhere made, but not complete from want of notice to the debtor or for failure to comply with any other requirement of the law of the debtor's domicil, though complete by the law of the place where made. *Martin vs. Potter*, 34 Verm. R., 87; *Worden vs. Nourse*, 36 *Id.*, 756; *Van Buskirk vs. Hartford*, 14 Conn. R., 144; *Johnson vs. Parker*, 4 Bush, 149; *Ingraham vs. Geyer*, 13 Mass., 146. We think the latter the better opinion. *Debita sequuntur personam debitoris* is the maxim of the civil law, and it is sustained by the universal practice in cases of administrations and bankruptcy. As is said by McKinney, J., in *Swancy vs. Scott*, 9 Hum., 332: "To say that a bond or other evidence of debt is assets where found is not only incorrect but absurd;" and as we have already seen they are not treated as assets in the hands of the administrator of the domicil, unless the debtors are found there, but are assets in the jurisdiction where such debtors are to be found; and we have seen that the same is the law in cases of foreign bankruptcy. We know, too, that for the purposes of attachment and other legal proceedings debts are everywhere regarded as having locality where the debtors live.

But when the debt is payable at a particular place, or is a fund in the hands of a trustee, there can be no question. If anything intangible or any chose in action can be said to have locality we should say it would be a legacy in the hands of executors at the place of the last domicil of the testator where only it can be claimed.

Two other exceptions to the application of the law of the foreign domicil remain to be briefly noticed.

The books and cases establish that the law which governs stocks in incorporated companies is that to which they owe their existence. Nor can the law of the foreign domicil of its owners be invoked for the purpose of attaching to them incidents or properties which do not belong to them by the law of their creation. It is familiar law that no corporation can exist outside of the law whose creature it is and of course can have no locality except within the reach of that law. Upon this point there has been no controversy; and hence we find it everywhere admitted that as to all contracts in respect to it, as well as the manner of its transfer, and all the rights thereby acquired as against its owner, as well as third persons, the law of *its* domicil is conclusive. This is necessarily so; for to give effect to the foreign law in such cases would be in many instances to give control to it in matters of domestic government, which no State could tolerate, and

which, when we consider that a vast amount of the wealth of every civilized country is now controlled by corporations, might be regarded as highly dangerous.

Nor can any good reason be seen why as to locality and its consequences any distinction should be made between what is known as the capital stock of a corporation and the shares of its stockholders. A distinction has, however, been made, as in the case of the Union Bank *vs.* the State, 9 Yerger, 490, where it is said that the capital stock of the bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation to be used and managed for the benefit of the members who have no more claim to the ownership of its property than a person who has no connection with it. Whereas the share of the individual stockholder is only his individual interest in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter, not capable of being taxed on account of its locality, because it can have no locality as, being a chose in action, it necessarily follows the person of its owner; and any tax upon it would be in the nature of a tax upon income, and from its very nature a tax *in personam*, and not *in rem*, of necessity confined to the person of the owner, who, if a non-resident, would be beyond the jurisdiction of the State, and not subject to its laws.

To this view of the interest of the stockholder, we can not subscribe. It is true that such shares are intangible. They have no *corpus*; but, as we have seen, there are many such rights—*jura incorporalia*—to which locality is assigned by the law. The corporation itself is of that very character, and the same thing must be admitted of the capital stock, both of which, in contemplation of law, have locality. Nor can we see why so wide a distinction should be made between the latter and the individual stock of the shareholder. It is true that the shareholder has no right to the immediate possession of any of the property of the corporation. He has committed his interest for the time to its control; but to say that he has no interest in it for that reason, is to say that the man who leases his land has no further interest in it, or that the man who puts his money into a common fund for investment or speculation, has parted with all right to it. Upon what does the value of his share depend except upon the value of the capital stock and its productiveness? And how can the value of the latter be depreciated without lessening the value of the former? Or how can one be taxed so that

the burden shall not fall upon the other? The stockholder's share is his interest in the capital stock of the corporation, and the two are so intimately blended that they can not be separated. And while it is true that one stockholder may not take possession of or control any of the property of the corporation, when all the stockholders combine, its capital and property are all at their disposal, and thus aggregated they may be said to be the corporation itself. The capital stock is divided into shares to be parcelled out among the stockholders as the measure of their respective interests, an arrangement which may be said to be a part of the machinery of the corporation for the management of its business. If, then, the corporation and its capital stock have locality, as undoubtedly they have, it is hard to see why the same property should be denied to the shares of the individual owners, unless we say that the mere paper certificate of his share is his stock.

Besides, it is agreed that the doctrine of the law of domicile as we are now treating of it, applies only to property which is movable; and that for this reason it has no application to easements, rents, leases or other charges upon lands, because the rights arising from them, spring from and attach to the realty, which is immovable. They, therefore, have an imaginary locality where the land is, and do not follow the person. Why should not the same character be given, for the same reasons, to the rights to dividends from the business, with the ultimate right to all the residuary effects of a creation so strictly local and immovable as a corporation?

If, then, we are to give such shares locality, where shall it be? They are incorporeal, invisible, intangible. But they are inseparable from the corporation, and together represent the whole value of its property and franchises. Without it they do not exist. How natural and proper then that they should be localized, not only for legal but for political purposes, where the corporation is fixed by the law of its existence. And to such locality are they referred by the authorities, from which it would seem that the distinction in the case referred to in 9 Yerger can not be supported: *Con. Laws*, § 383; 2 *Kent*, (9th ed.,) 430, and notes.

The vast growth of the number and wealth of corporations within the last few years has caused this question to assume an importance in both a legal and political view which it did not formally possess; and hence we find under this change of circumstances, the Legislatures of the country tending more and more from motives of both interest and policy, to localize all such interests, and we may expect the same tendency from the courts.

As is said in the book before us, "Such bodies hold in their employment multitudes of men, as well as a large part of the scientific, if not of the literary ability of the land. They are capable of convulsing or quieting the money market; of producing a panic, or of inaugurating a reign of delirious inflation. If, by any agencies the Legislature or judiciary could be corrupted, or public sentiment debauched, it is by such as these. If we can suppose, under republican institutions, the case of a subject becoming greater than his sovereign, such a supposition would apply to the relations of some of these great corporations to the States by whom they are created. The railroads of the United States, for instance, had cost, on January 1, 1871, \$2,620,000,000, or twenty-two per cent. of the entire assessed value of the property of the United States. Would any Government tolerate the application to such corporations of the maxims, '*mobilia personam sequuntur*, or *mobilia ossibus inherent*?' Would it be even argued in this day that the law to which such corporations are subject is not the territorial law of their site, but the law of the domicil of their owners? Would any State surrender so tremendous a power to foreign hands? If the greater part of the stock of one of these corporations should be owned by German capitalists, would it be argued that the interest thus held was to be governed by German law?"

The last exception to the rule that the law of the domicil controls personality, which we shall notice, is that which grows out of the claim of every Government, that every species of property within its territory, no matter where its owner may be domiciled, shall contribute its proportion of the expenses of the Government as the equivalent for the protection afforded to it by such Government. And on this point we need do no more than quote from the able opinion of Judge Comstock in *Hoyt vs. the Commissioners of Texas*, 23 N. Y. Rep., 227. In that case, the relator, Hoyt, claimed that certain personal property owned by him in the State of New York was exempt from taxation on the ground that he lived in New Orleans. In delivering his opinion in the case the distinguished Judge used the following language: "It is said, however that personal estate by a fiction of law has no *situs* away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey, rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law, which, to all intents and pur-

poses, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory would lead us: The necessary consequence is that goods and chattels actually within this State are not here, in any legal sense, or for any legal purpose, if the owner resides abroad. They can not be taxed here, because they are with the owner, who is a citizen or subject of some foreign State. On the same ground we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in case of the bankruptcy of such a person we should at once send abroad his effects, and can not consistently retain them to satisfy the claims of our own citizens. Again, we ought not to have laws for attaching the personal estate of non-residents because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicile. Yet we do, in certain cases, administer upon the goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt, until creditors here are paid, and we have laws of attachment against the effects of non-resident debtors. These and other illustrations, which might be mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is, by no means of universal application. Like other fictions, it has its special uses. It may be resorted to where convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice according to the maxim *in fictione juris semper equitas existat*." And after quoting from the commentaries of Judge Story to show that the fiction will always yield when necessary for the purposes of justice, he adds, "I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it, and protected by its laws, than to compel it to contribute towards the maintenance of government and law. Accordingly, there seems to be no place for the fiction of which we are speaking, in a well-adjusted system of taxation." After referring to and quoting from a number of cases decided upon the same point, he adds: "The cases which I have referred to were determined by the highest courts in five States of the Union. They appear to be entirely pertinent to the question now before us, and I am not aware of a single decision to the contrary." And in the course of his opinion, he shows the absurdity of the contrary view by supposing a man to be taxed at the place of his domicile, upon property the very exist-

ence of which was wholly denied by the laws of that domicile, as for instance, the citizen of Massachusetts upon his slaves in Louisiana. The same question has since come before the Supreme Court of the United States, and was settled in the same way: *St. Louis vs. The Ferry Company*, 11 Wall., 423.

We do not propose to follow this subject further. It might be interesting to inquire as to what cases or classes of cases, the law of the domicile would yet control the property of the owner abroad. No doubt there are such cases, as when a conflict arises as to goods in transit, ships at sea, and perhaps other property similarly located. It is evident that the rule is not now viewed with much favor, and aside from cases of succession and marriage, has been of late so circumscribed by the courts as to have become of less importance, perhaps, in its practical application, but none the less interesting on that account to the student of international law, or important to the legal profession as, with all its modifications, it still constitutes one of the distinctive features of personal property and in matters of wills, successions and marriage, has lost none of its consequence.

When we consider the great increase which has taken place in the quantity and value of personal property in its various shapes and modes of employment, many of which were unknown to our ancestors of the last century, it will not appear strange that a disposition should be shown in every government to restrict within its territory the application of the laws of other countries upon mere grounds of comity. The idea once prevailed that it behooved each nation to guard with jealousy its lands, and to confine their ownership to its own citizens, lest, forsooth, foreigners or foreign nations should acquire a foothold upon its territory, and thereby endanger its safety. Hence, it early became the political policy of every country, either to exclude all foreigners from control over its soil, or at least to prevent the intrusion of any foreign law which could, by any possible means, lessen its own complete dominion over its territory. And from the earliest times to which the history of our law reaches back the rule was inflexible, that land which was immovable, and everything attached thereto, was to be controlled by the law of its location—the *lex rei sitæ*. But as no such consequences were to be apprehended from the ownership of such unimportant and unstable property as personalty then was, and as it suited the general convenience in those primitive times, and perhaps the wishes of its owners, a different rule was adopted as to it, which was expressed in the old Latin maxims which we have quoted. But since that time, the rela-

tive importance and value of the two kinds of property has greatly changed. The increase of personal wealth has been incalculable; and now, if any danger is to be feared to the safety of governments from the control of property for their subversion or corruption, it is not from the power or influence which can be brought to bear by their mere landed proprietors, but from the corrupt use of movable wealth. In this regard, the two kinds of property now hold reversed positions. And when we add to this the growing necessities of governments for larger revenues, and the consequent increase of late years of the burden of taxation, which requires of every nation a stricter enforcement of the principle of making all property within its protection contribute to its support; and for this purpose to fasten its claim upon everything within the reach of that protection, and, from the great increase of trade and commercial intercourse, a duty every day more incumbent of protecting its own citizens from the fraud and imposition of non-residents, it will seem no longer just or practicable to adhere to the old tenets of the law on this subject.

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Rules of Evidence--As Affected by Religious Belief.

Probably no branch of the law has been so much changed in the past thirty years, as that of evidence; and an investigation into the establishment and subsequent modification of a limited number of the rules of evidence, can scarcely fail of being both interesting and practically beneficial to those members of the Bar who tend to view Jurisprudence from a philosophic standpoint. It has frequently impressed itself that the law, either in its details or as a whole, is too rarely considered in its scientific bearings; and too little attention is bestowed upon the causes that have influenced its growth and change. To an exposition of a single rule of evidence, as it has been affected by the religious opinions of the past, this article will be principally devoted; and in addition, two other rules will be noticed, which, being once firmly established, are now fast disappearing from among the laws of every civilized State.

In pursuance of this design, it will be expedient to notice these three rules themselves; to trace the method and cause of their original establishment, and, especially, to analyze the process of the rise and decay of the rule of exclusion of witnesses by reason of a defect of religious belief. Into this investigation, many facts and speculations will properly come which may seem to be beyond the pale of a strictly legal paper; but, in extenuation of this plan, it is conceived that most law articles are too strictly confined to statements of what the law is, and not sufficiently indicative of how it came to be as it is.

Doubtless, the highest and most engaging expression of knowledge is to be able to predict; but it is a labor, neither of ease nor one devoid of utility, to designate the means by which have been established certain legal principles, and to elucidate the causes, and trace the social phenomena, that afterwards influenced their modification or repeal. To accomplish these results, with even a small degree of satisfaction or accuracy, it is necessary to search beyond the meagre and uninteresting information contained in the ordinary works designed for the students and practitioners of the law, and somewhat to acquaint ourselves with the institutions, beliefs, characteristics and history of the people among whom these legal principles were founded, from whom they were transmitted, and by whom they have been developed, modified and improved.

The subjects to which attention is now to be directed, are the three following rules of evidence as they existed at Common Law:

I. The exclusion of the parties to actions from testifying.

II. The exclusion of those pecuniarily interested in the result of the suit.

III. The disability to testify by reason of a defect of religious belief.

As will be noticed, the first two of these rules formed a portion of the Roman law, and while the causes that led to their adoption by the builders of that wonderful and complex frame of Jurisprudence, are worthy of deep and extended research, yet the limits of this article will permit only a slight allusion to them. Even in the treatment of these three rules, as they related to the common law, there will be excluded any inquiry in so far as the criminal and chancery courts were peculiarly concerned; as by such treatment it is deemed that the investigation will be greatly simplified, and that little will be lost in the illustrations requisite for a tolerably clear understanding of the social, political and religious conditions that first inaugurated and has since tended to subvert them.

The earlier rules of Roman Judicature permitted to be given at the trial of a cause the testimony of all persons who were acquainted with the matter in issue;¹ but the later rules were far stricter, and sedulously excluded as witnesses not only the parties to suits their relatives and servants, but also all those in any manner interested in the event of the cause. The English common law, as written by Blackstone, while it dropped the rule excluding relatives and servants, added the third now under discussion.² Great alterations have been made since were spoken those somewhat more elegant than erudite lectures of Blackstone, upon a system of laws wherein the courtier rather than the judge, must have prompted the opinion that they were almost perfect; and the rules now of force in England, and in many of the United States, are such as to admit all evidence deemed pertinent to the issue, and which is not obnoxious to the charge of being hearsay, or secondary, or of coming from one incapacitated by defect of understanding. This last rule, so obviously necessary and logical—and depending so largely for its proper enforcement upon the mental condition and even idiosyncracies of each witness—should prevail in all systems of evidence, however it may

¹ 1 Vol. Mommson's Hist. Rome, p. 205.

² Blackstone's Com., p. 369, and note; 1 Starkie on Ev., p. 85, and note; 1 Greenleaf on Ev., § 327.

be modified to meet the exigencies of cases and the advance of technical and psychological knowledge.

Not until a little more than twenty-five years ago was the common law rule excluding the testimony of the parties to actions, abolished in any of the United States; and this was first done in Michigan, in 1846, soon afterward in Connecticut, and then in other States. The rule of exclusion on account of defect of religious belief, was first abolished in Missouri in 1845, and the exclusion by reason of interest was first removed in Connecticut as late as 1849. Prior to these radical changes, however, is to be traced the modifications that these rules underwent in construction, at the hands of liberal and learned judges. Among these may be mentioned the important ruling in *Ornichund vs. Barker*, Willis, 245; 1 Ark., 21, S. C., where it was settled that a simple belief in a God who will reward and punish, is sufficient to remove the exclusion on account of defective religious opinion. Subsequently, by the course of decision, it became to be doubted, if it were even settled law, whether a belief in a future state were necessary, provided accountability to God in this life were acknowledged.¹ This certainly was a great relaxation of the old rules, which had their very foundation in the doctrines of immortality and future accountability, and clearly prognosticated the yet larger views that are finally to put an end to all inquiry made to any person for the purpose of imposing the slightest disability on account of any opinion held upon any subject, religious or otherwise.²

These restrictive measures have been most reluctantly and tardily removed, and their repeal may be pointed to as an example of that negative legislation which is so highly commended by Mr. Buckle. Probably it is the most remarkable peculiarity of the history of modern legislation, that many of the best laws are those whose only office is to remove the restraints applied by former lawmakers. Aside from the laws of evidence, the usury laws, revenue laws, regulations governing marriage, and the property of married women, and many others, were all the result of that protective policy which has so long been the bane and specialty of legislative occupation. The largest reforms and the highest wisdom have been shown when our legislators have turned their invaluable attention toward the removal of old, rather than the adoption of new, regulations. The greatest duty of those called to govern, would be to give liberty by displacing the burthens that the lauded, yet foolish, past has imposed upon society;

¹ 1 Greenleaf on Ev., § 369, and note.

² Const. of Ga., of 1868.

and which have so long, and so painfully, impeded its upward and onward march.

However, the statement may engender dispute, yet it is, probably, susceptible of proof, that those men who are commonly delegated to make the laws of a country are, as a class, owing to their peculiar habits of life, considerably in the rear of the true thinkers and reformers of the age. Almost all the salutary changes in the laws of a people arise from the theories of the more learned and profound, who are out of public life, being adopted by those who are mainly engaged in the activities of life and the practice of governing. Indeed, so true is this of all classes and professions, that it is found in the department of jurisprudence that the greatest and most voluminous law writers have rarely been either large or successful practitioners. So, too, those men who have originated and given expression to the ideas which, being adopted by legislatures, have wrought the most beneficent changes in the polity of nations, have, with few exceptions, been those who were seldom, or never, engaged in the turmoil and business of practical government.

To think out correctly what should be done, is an easier task for a quiet and philosophic reasoner, than for one who, engaged in the conflicts and policies of life, has his sympathies and prejudices always blended with, and too often controlled by, his daily avocations.

Leaving, however, these interesting speculations, let the real merits of this investigation be stated thus:

By what process were these rules of evidence evolved, and through what influences have they been modified and abolished?

In seeking a solution for this question, it is requisite to go beyond purely legal knowledge, or that information contained in law books. As before intimated, it is the pre-eminent defect of this class of writings that, while they are sometimes accurate and exhaustive in telling what the law is, they rarely attempt to enter into even the slightest explanation of how the law came to be as it is. They show the changes wrought by statutes and decisions, but they fail to examine or designate those social and political aspects from which these statutes and decisions themselves arose. It is conceded that an extended view of this branch of inquiry more properly belongs to a *History of Jurisprudence*, yet, even a slight insight into these causes, given by law writers in the introductions to their treatises, would be of great interest and benefit to their readers; while it would, mayhap, facilitate the labors of the future compiler of that Grand History

which some genius, it is hoped, shall some day write for the edification of mankind, and the glory of his own name.

Neither in Coke, Blackstone, nor the various works specially devoted to Evidence, is to be found any elucidation, or even mention, of the causes that operated to annul the old laws relating to the admission of testimony under the Anglo Saxon and Norman governments. And it is a further fact, which at once points the character and the deficiency of law books, that none of them contain other than a most superficial discussion of the causes which wrought that important change in the history of the English law, when the methods of conducting trials as in existence before the Conquest, fell into disuse, and there became adopted those rigorous rules that were in existence when Blackstone compiled his Commentaries.

As it is now proper to consider the manner in which these rules of evidence became established, it will not carry us beyond this plan to arrive at the rules of force in England prior to the full development of what is now known in America as the common law. It is quite well settled that the mode of conducting judicial investigations among the Anglo-Saxons, before as well as some time after, the Conquest, was to allow to testify all the parties to the action, as well as all others who knew anything connected with and bearing on the case; and this without any restriction on account of the want of religious belief.¹ Precisely how long these liberal rules continued in force, it is as impossible to say as it has been to determine when the common law restrictions first became settled and fixed as a portion of that fabric, in commendation of which has well nigh been exhausted the vocabulary of encomium.

In the reign of King Stephen, who usurped the English throne in 1135, were introduced into that country the Roman civil and canon laws, and from these were borrowed many rules and forms of procedure, before that time unknown to the simpler modes of Anglo-Saxon and Norman judicature. While neither history nor tradition enables us to define the precise time when the rules of evidence, as taken from the Roman law, became adopted by the Courts of England, yet it is most reasonable to suppose that they were not established until after the formal introduction of these civil and canon laws. The old rules of Saxon and Norman law may, however, have become greatly modified even before that date, as, until after the Conquest, the civil and ecclesiastical courts were united, being jointly

¹ 2d Turner's Hist. Anglo-Saxons, pp. 527 to 531; 1 Hume's Hist. of Eng., p. 164; 1 Craik & McFarlane's Pic. Hist. of Eng., p. 245.

presided over by the *bishop* and *earl*. Ecclesiastical Jurisprudence grew up in England after the year 597, when christianity was first introduced by Gregory the Great. At any rate, whatever may have been the period at which these changes began or culminated, the causes of them can, to a very considerable extent, be found in the closer connection and better acquaintance, by the ruling classes of England, with that vast system of Jurisprudence that took its rise in the crude regulations of the twelve tables, and was enlarged and perfected by the many and learned Jurisconsults of the most extensive and flourishing of commonwealths. That is, two of the rules now under discussion must have greatly owed their origin to these causes. But the third rule, to which attention will be most specifically directed, and which excluded testimony by reason of religious disbelief, was unknown to the Romans, and was the offshoot of the peculiarities of the ages, and the singular mental condition induced by the religious spirit of those hapless times of ignorance and violence, from the fifth to the sixteenth century.

Unquestionably, the existence of such restrictive rules in the laws of a people, evinces not only a profound distrust in the veracity and honesty of all those who were in the least degree pecuniarily interested in the result of a suit, but shows that the capacity in the triers, of weighing, judging, discriminating and separating the true from the false, was very imperfectly developed. It proves that men not alone judged each other by a standard that supposed that selfishness almost invariably counterbalanced honor; that small advance had been made in the direction of estimating, weighing and sifting evidence. Moreover, a state of society is pictured where perjury is presumed to be the natural consequence of allowing an interested party to testify. To be honest was presumed to be impossible, where to be dishonest was lucrative. No man was considered capable of swearing to his own hurt, and changing not. To swear falsely was considered as a matter of course when one swore in his own concerns. To lie was presumed to be certain where a gain was even contingent. This deplorable unbelief in the integrity of interested parties, must have originated in some correct appreciation of what men really did do; and what they did thus unwisely do must have been the joint result of great ignorance, and some grave error by which the true reason for honesty and honorable dealing was overshadowed. This error was the prescribing of religious tests by an unenlightened and bigoted priesthood, only through a compliance with which could truth be sought or falsehood detected.

Assuming that the stringency of these rules of evidence were mainly the result of the false faith of the times, it will be the endeavor to show, deductively, the manner in which such rules were established on account of the very existence of the conscience tests themselves. In arriving at this conclusion, it will be requisite to advert, to some extent, to those laws which marked the national characteristics and special narrowness of that age: To inquire into the meaning and spirit of all judicial oaths, and to point out the changes in their sanctions and efficacy from ancient to mediæval times, and the causes that led to the decline, among the English, of their sanctity and importance.

I. The rules now being discussed were introduced into the body of the common law subsequent to the reign of Henry IV. And during that reign *all* the evidence was, for the first time, required to be given publicly to the jury in presence of the court,¹ and the judges could only, after this change, have begun to establish rules regarding the classes of persons whom they deemed competent to testify. After this period, a large portion of the law of the realm was made by decisions delivered from the bench, and constitute what is known as *judicial legislation*; and the peculiar traits of the earlier developments of this legislation, which has just been shown to have commenced during the reign of the fourth Henry, and immediately after the substitution of the *jury* for the recognitors, will aptly illustrate the calibre and character of the judges of those days. Immediately, these judges commenced to curtail the sources of testimony, and to confine the giving of evidence to those persons who had no interest in the matter in dispute. These judges were either clergymen themselves, or were those thoroughly imbued with the religious spirit of the age, and whose notions of law were principally borrowed from Rome, and whose standards of morality were altogether modeled after ecclesiastical forms. They soon began to engraft upon their own crude conceptions of the rules of the civil law, still cruder conceptions of the divine law; and with a monstrous insolence they closed the halls of justice against the testimony of those whose beliefs or infidelities they conceived, had placed them beyond the pale of heavenly redemption. All forms, modes and phases of judicial procedure became subservient to the one ethical idea of the middle ages: that all honesty must be measured by religious opinion, and that in determining the competency of a witness, as in dispensing the patronage of an empire, the correctness of belief must be looked to, and not the manner in which

¹ Pomeroy's Municipal Law, § 131.

were discharged the duties of life. For, indeed, there seems to have been but one great duty in life, and that was to prepare for another life by *thinking* rightly in this.

The rule of exclusion on account of a defect of religious belief, applied to all persons who did not subscribe to the doctrines then of force among the governing classes in England, and operated alike against Jews, Infidels, Heathens, Atheists, and those excommunicate.¹ Later, the rules were so far relaxed as to exclude only those who disbelieved in the existence of a God, by whom truth is here enjoined and falsehood hereafter punished. These first conditions of exclusion continued until after the Reformation; and while the religious opinions of the people had changed, yet this change was so far the result of the perception and dislike of the special abuses of Popery,² that neither the rules of law nor the practice of the courts were altered or liberalized. The civil government was continued in its old channels, and the judges, for the most part, remained wedded to their old forms and old prejudices. And when some of the judges began to be somewhat liberal-minded, when the influence of the great mental movements of the sixteenth century began to assert itself beyond purely religious circles, then came the laws of Parliament, and, through the Acts of Supremacy and Uniformity, all persons were subjected to religious tests before they were allowed to enter upon, or continue in, offices of trust or profit.

These acts were passed during the first years of the reign of Queen Elizabeth; and the effect of the first act was to oblige both ecclesiastics and laymen, holding office under the government, to take the oath or vacate their positions. The latter statute struck even more directly and violently at the conscientious scruples of individuals, and prohibited, under severe penalties, the use by a minister of any but the lawfully established liturgy, and imposed a fine of 1s. upon all persons who absented themselves from church on Sundays or holidays.³ In the words of the learned author of the Constitutional History, "These two statutes form the base of that restrictive code of laws, deemed by some one of the fundamental bulwarks, by others the reproach of our Constitution."

Thus these laws, avowedly aimed at the suppression of the Roman Catholic religion, and intended to advance what the Government considered the purer and better worship, did not confine their blighting influence to the persecutions, which they aroused against the one

¹ 1 Phillips on Ev., p. 19, n. 7.

² Hallam's Const. Hist., p. 58.

³ Hallam's Const. Hist., pp. 73, 74.

sect, but ramified throughout society, and, beyond all other causes, confirmed and intensified that wide-spread distrust in the sincerity of men, and served firmly to establish those rules which excluded from the witness-stand every one who was interested in the event of a suit, or whose religious beliefs came not up to the standard of the clergy. Under such regulations, not less impolitic than tyrannous, it became the habit of a large portion of the people to dissemble, to play the hypocrite and to swear falsely. Truth and conscience became so much a matter of safety and profit, that soon they were largely subservient to safety and profit. The slight consideration given to probity and conscientious scruple is well illustrated by a puerile, yet successful reply made to the irrefutable argument urged by a few bold thinkers against the iniquity of these Acts. In Strype, p. 270, in relating a speech made in favor of the passage of the Act enforcing the oath of supremacy, the reply is thus set forth: "They say it touches conscience, and is a thing wherein a man ought to have a scruple; but if any hath a conscience in it these four years space might have settled it. Also, after his first refusal, (to take the oath) he hath three months respite for conference and settling of his conscience." So, it was considered that no belief could be too earnest, no honesty of purpose too exalted, not to be changed by reference to pecuniary profit, bodily discomfort or political honors!

It is mentioned by Hallam that at the time these Acts were being rigidly enforced, the students at the inns of Court, and the lawyers in the most eminent places, were generally favorable to Popery. Most of these, in order to retain their places and emoluments, simulated a conformity and took the oaths; and here is to be found the strong reason why the tendency of those who were soon after actively engaged in the law departments of the Government, was to discourage changes in the rules of evidence, and to enforce the existing restrictions with severity and thoroughness. Furthermore, as the lawyers of England have long been a powerful class, and as the principles of the common law, far more than those of any other system of laws, have been established by custom and judicial usage and decision, it is readily perceived how the deep-seated convictions, mental bias and prejudices of the Judges and Bar would exercise a strong influence in shaping the rules for the admission or rejection of testimony in trials at law.

II. The taking of oaths or a solemn invocation of divine disfavor upon him who wilfully testifies to what is false, was not unknown among the ancients both of Asia and Europe. They have ever had

their origin in the religious sentiment of mankind; and among peoples too low for the sense of accountability to affect they have never pertained. However important these forms may have been considered as the means of insuring candor and adducing truth, there is no record that any class of persons were ever restrained from giving evidence in the tribunals of the ancients by reason of a defect of religious belief. Oaths were then, as now, considered necessary to bind the *conscience* of the witness; but the ancients were less scrupulous, or more charitable, in that they never applied tests to determine if the person offering to testify was possessed of that proper degree of faith that made available and trustworthy this admirable but indefinable adjunct of honesty and truthfulness.

There is not to be found in Montesquieu's *Spirit of the Laws* any extended mention of the spirit that has prompted all Legislators to require the testimony of witnesses in judicial proceedings to be given under oath; or of the later and narrower spirit which entirely excluded those from testifying who did not attain to a certain standard of theological belief. This erudite and laborious author has only bestowed upon this branch of his subject a few remarks concerning the importance attached to oaths by the Romans,¹ and some allusions as to the effect and manner of taking them among the Salic and Ripurian Franks. There is no endeavor to portray the beliefs that induce men to take oaths before offering testimony, nor to trace the rise and development of that pungent fanaticism which in the Middle Ages changed the sanction of an oath from temporal to future punishment. The Greeks and Romans swore by their gods with scarcely a belief or a fear that their gods could punish hereafter. The forms of their oaths sufficiently prove that the direction of their thoughts toward heaven or hades was more to impress the power of the gods over man while on this bank and shoal of time,² than to awaken a fear or suggest a hope that divine wrath or mercy would be visited upon them when launched forth on the illimitable sea of eternity.

To the ancients special providences were the only providences; for the gods were conceived incessantly to occupy themselves with the gravest concerns as well as the most frivolous affairs of the mortals; and this intermeddling was done with small reference to the dignity or merit of the personages, whose pursuits were so watchfully cared for. These gods, too, not always being tutelary to the same objects were not at all times in accord, and were not infrequently brought into personal collision by reason of their favoritisms

¹Montesquieu's *Spirit of Laws*, book 4, p. 120. ²I Mommsen's *Hist. of Rome*, 207

or hatreds. We have accounts of the anger of Jove finding expression in the indecorous act of hurling Neptune from Olympus into the sea; and Homer has, in his incomparable manner, recorded a conflict between a goddess and the deity of battles, in which the fair one so far triumphed as to lay the warlike god full upon the plain. The labors, the loves and the residences of the divinities of the erudite and elegant polytheists were confined to a single world; and the magnificent conception of a single God, creator of many worlds, was, as if to show the wondrous yet erratic power of the human intellect, reserved for the son of a bondswoman and the leader of a perverse and unlearned race.

These considerations render it altogether apparent that there was a marked distinction in the spirit of the oaths of the ancients and those that came to be so plentifully applied under the administrations of the common law. The distinction was this: The sanctions of the first were all earthly; the sanctions of the last were of the life to come. If oaths are better observed now than in olden days it is because the advance of knowledge has rendered possible the greater certainty of the detection of perjury, and impressed the witness with the impropriety and fear of exposing himself to social disgrace.

Whatever doubts may be entertained by a philosopher or a skeptic in relation to the validity of the proofs upon which are founded the doctrines of immortality and future accountability, or of the advantage to be derived from the beliefs themselves in directing or restraining the motives and passions of men, yet those doctrines have been so firmly fixed in the intellect of those countries where christianity has been received, that they can be considered as having exercised an almost inestimable control over human actions. To such influence without doubt may be attributed the modifications in the sense and spirit of judicial oaths since the days of the Cæsars. And how natural and easy is the step from the belief that the primary importance of oaths consisted in the binding of the conscience by reason of a fear of future torments to the conclusion that those who did not so believe would find in themselves no motive to speak honestly and well! During the reign of theology, heresy and infidelity were of all things the most foolish and most wicked; and that no encouragement should be given to such grave offenses, so that the soul should be saved from everlasting perdition, no means were left untried to direct, persuade or coerce the unbeliever into the only true and narrow path to life eternal.

Exclusion from testifying in a court, even if truth could come from an infidel, was but a small disadvantage to the society or the individual whose fondest tenets were that whatsoever that was good and noble and true must reach us only beyond the grave.

Among the ancients the differences of religious beliefs, as they affected judicial veracity, were of no import. Every one was presumed to believe in some of the gods, and the skeptical spirit was either unheard of or uncared for in the great variety of opinions and worships. Socrates is the most noted and most deplored of the ancient martyrs to infidelity; and his offense acquired its gravity and its notoriety from the supposed subversion of the political and national authority that the misconception of the nature or the repudiation of the power of the gods would entail. A great historian has noticed that the ancients were singularly free both from the spirit and practice of persecution; and the indifference with which religious opinions were regarded among the Romans is doubtless attributable to the fact that where there was so much from which to choose, every one was supposed to be attached to some form of belief.

The abstract principle upon which the utility of oaths appears to be founded is, that the Deity concerns himself especially to punish those who wilfully bear such false witness against their neighbors as is calculated to injure them; and to call attention to this principle, and to imprecate divine vengeance in case of perjury, are the purposes which the administering of oaths are conceived to subserve. An exclusion for want of faith, while it inevitably tended to lessen the quantity of evidence that should be offered, also precluded from testifying some of the most honest and truthful of men. Nor did the evil stop here; for the fact of assuming testimony to be true, if it came from the lips of a believer, operated to check the tendency strictly to inquire into and discreetly to analyze the evidence of each witness—a rational and equitable method that courts of justice should ever conform to.

From these remarks it may not fail to appear that the chief elements in the establishment of this common law rule, which excluded a witness by reason of defect of religious belief were the misapprehensions and distortions of those two sublime but vague doctrines of the immortality of the soul and of future accountability.

It is now in turn to trace those political phenomena of the middle ages which conspired to carry religious intolerance into every department of life, to invest the makers and ministers of the law with the power of applying the rules derived from this intolerance, and to place

almost under its control the methods of conducting trials at law and the very genius of jurisprudence itself.

The system of polytheism being so disseminated, was proportionably weakened, and rarely excited in its votaries a large degree either of enthusiasm or animosity. But the doctrines of christianity, as they are more fixed, and centered absolutely upon one great exemplar, were adapted to inspire the largest amount of earnest belief and violent fanaticism; and to the certainty of its tenets it superadded the belief, and awakened the hopes of a future fraught with every bliss for those who followed its teachings, or every torment for those who neglected or refused such conformity. The Roman pontiffs were, although often men of learning and talent, scarcely ever more than the masters of certain State ceremonies. The priests of the middle ages were the heaven-chosen ministers of the holy and perfect revelation of the Divine will; and the common ambitions of men, conjoined with the authority and prestige of a blessed church establishment, grasped, and for ages held, the supreme power both in religious and secular affairs. With this, the Feudal system, introduced into England by the Conquest, placed unlimited dominion in the hands of the Nobles and Crown, and these were under the absolute control of the clerical authorities. A king might govern a nation, but a priest must keep the king's conscience. The clergy, or those under the influence of the clergy, made and executed the laws; and to these men nothing was so greatly against all law as *unbelief*. This was the one unpardonable sin; and this narrow superstition has not yet ceased to animate the creeds and enliven the eloquence of christian divines. The ambition, the interest, and the sincerity of the clergy, demanded that every legal principle, and each judicial rule and decision, should have for their primal object the consolidation and extension of the church, and the suppression of schism and infidelity. Both schism and infidelity were considered damning sins, and both alike unfitted a person for the proper discharge of the obligations of this life, or the participation in the joys of the next.

Naturally enough, where the rules of evidence were prescribed, and justice was administered by men of such tempers, no means were left undeveloped to maintain the power and advance the welfare of the church, and its power, welfare and purity were conceived to consist in its secular authority, in the number of its adherents, and in the influence of its directors. To swear falsely was a crime against society and against God; but to swear truly was only probable when the obligation to society and to God had been recognized through a belief

in the only true and binding words of God. He who was at enmity with the Creator, by reason of disbelief, was equally at enmity with the creatures. No motive for rectitude of conduct was admitted, except correctness of belief. No proposition was clearer than that he who was insensible to the fear of God's wrath, must also be callous to his neighbor's good and his own reputation. It was never dreamed that human conduct could be rightly regulated by motives other than a fear of Hell; and it was necessary to believe in order to fear. If time or space permitted, it might not be uninteresting to note, somewhat at large, the baleful influences of the *Demonology* of those ages, when the most horrible inflictions were regarded in the light of a kindness and a blessing, if they induced or extorted an acceptance of the prevailing faith, and when the "roaring lion" could only be eluded by hastening to seek an asylum in the bosom of the all-powerful Church. The genius of Milton and of Dante has graphically pictured the torments that await the unbelieving soul; and the latter poet, by a master stroke of the terrible and the un pitying, has written over the brazen gates of Hell:

"Ogui lasciate speranza."

At the time of the establishment of these rules, the grossest ignorance and superstition prevailed throughout the whole of Europe. Such learning and intellectual vigor as existed at all was almost exclusively confined to the church; and the law conferring *benefit of clergy* in England was a noted instance both of the exercise and the abuse of the knowledge of those ages. With the human mind in so backward a condition, the principles underlying the enactment and execution of the laws, were necessarily of a crude, and often of an extremely harsh, character; and a slight examination into the spirit of the legislation and judicature of the times, will exhibit those barbarous but natural methods which are adopted by a people before they have sufficiently advanced to compare, to discriminate and to weigh circumstances, and to reconcile conflicting testimony. Where judges and juries are unable to compass these mental labors, the most obvious course is to restrict the rules and leave unopened the avenues from which may issue the necessity for such investigations, by attributing to a certain *kind* of evidence the merit of conclusiveness. In these rude times, before the intellect had acquired the power or habit of refining and drawing nice distinctions, the only effort was to settle upon and define a few easy rules; and the practice was to arrive at the result or verdict in the trial of a cause by the application of these rules, each one of which had its own weight and special influence.

If twelve men would swear that their friend or neighbor had not, in their belief, committed an alleged offense, the law conclusively presumed this as sufficient to exonerate the accused—and such evidence could only be overturned by other as tangible, as direct, and as indisputable. Circumstances could have no effect to displace such positive testimony, because circumstances would require to be sifted, weighed and examined with scrupulous and scrutinizing care—efforts of which the judicial mind of the times was utterly incapable. The indefinite, the to-be-ascertained, was ever excluded, so far as could be; and this system of discarding the functions of discretion and judgment, and the elements of probability and uncertainty, was carried so far as to have the value of each man's oath, and the amount he could claim as plaintiff, or lose as defendant, fixed at some positive and unvarying standard, according to his *status* in the government. Peoples, as individuals, learn to count before they learn to compare; the faculty of calculation precedes the faculty of judging; and it was far easier to ascertain the worth of the testimony of a *coerle* or a *noble* by affixing to it some definite and unchanging merit, than to determine it by their characters, their means of knowing, powers of observation, and manner of testifying.

The reason for the adoption of these methods, however, was twofold: A strong belief in the special interpositions of God; and a small capability of judging. The ordeal of water or iron, and later, the wager of battle, were direct appeals to the protecting care and active interest of Divine power; and so the same firm belief in Divine interposition, in the most ordinary and trivial affairs of men, made possible the rule of compurgation. If heaven could shield the accused when he plunged his arm into boiling water, or carried hot iron in his naked hand, so it would punish, in some open and apparent way, those who falsely testified to his guilt or innocence. The decision of causes was not to be effected by nice calculations as to the weight, or directness, or probability of the testimony; but the duty of the judge was more to see the prescribed *forms* of the trial complied with, than to render a decision or expound a law. The decision was bound up in the result of the experiment. God was present and pronounced upon the guilt or innocence by his own direct interference and edict; and it was regarded as arrogant sacrilege that the reason of man should even attempt to mould the decrees of an investigation that Providence so delighted to watch over and direct. True, the argument defeated itself, for if Deity so directly judged a cause, it was a labor, both of supererogation and profanation, for man thus to interfere or

to assist, by the establishment of tribunals or the execution of sentences, in matters so peculiarly within the province and under the supervision of Jehovah. But the men of those days were little in the habit of pushing logic to extremes. Thus we discover that the too strong belief in what are termed *special providences* has ever had the tendency to retard the progress of man in the free and correct exercise of his faculties, and has long delayed in the departments of Jurisprudence, as in those of politics, of morals, and of social arrangements, that reliance upon *reason* and *law* from which alone can be drawn the facts and generalizations requisite for the construction of sciences and the highest development of ideas.

After the belief in special providences had grown weaker, and the rules of law had begun to be made with reference to the employment of a certain degree of reason and discretion in the decision of causes, it is found that the belief in the integrity of those who were theologically competent and credible as witnesses, began also to be less strong than during the times of compurgation.¹ Then came sufficient light to show men how absurd it was to seek for truth in the observance of mere forms and ceremonies, rather than in the exercise of the judgment upon many facts and circumstances; and, as is common, it was sought to rectify this abuse by introducing other *forms* to take the places of those that were discarded. When the Compurgators, who had been both witnesses and jury, lost that dual character, and were constituted a jury to *hear* testimony from others, and then to decide, the judges began to establish rules defining legal evidence, and for the exclusion of certain persons from giving evidence.² The subsequent increase of knowledge, and larger acquaintance with the Roman law, induced a further restriction, and also the modified adoption of the civil law rules as to who were deemed interested parties in an action at law. Still later, and from causes unique and extraordinary in themselves, followed the rule of exclusion by reason of a defect of religious principle; and yet later came their relaxation—the process of disintegration—and now the tendency is to arrive at verdicts or results in all legal trials by a large generalization of complicated facts, by a careful and analytical consideration of various kinds of evidence, and thus to call forth the powers of discrimination and comparison. By reason of this relaxation, a larger class of facts, circumstances, incidents and specialties is, and ought to be, submitted to the triers of causes, than was permitted under the old system, and in proportion as general education and mental acumen increase, will

¹ Pomeroy's Mun. Law, § 124.

² *Ibid.*, § 236.

this method of trial be enlarged and perfected. Circumstantial evidence, even in criminal cases, is of comparatively modern application, and it has yet to be as liberally introduced into both criminal and civil trials, as it should. So, also, are the rules in both these branches of the law—when relating to *direct* evidence, and evidence *applicable to the issue*—entirely too narrow and restrictive; and it shall be among the achievements of the more scientific legislation of the future entirely to do away with many of them.

In conjecturing the time when the third rule of exclusion took its origin, it seems most reasonable to suppose that it was after the complete subjection of temporal affairs to the spiritual powers had in some measure re-acted, and that it came into existence for the purpose of aiding to quell that spirit of inquiry and skepticism which was so long, so bitterly, and so successfully persecuted and crippled by the clergy. It must have been adopted as a test of orthodoxy, and as a measure of enforcing conformity and precluding change. The love of tradition and precedent is now far too strong for the highest interests of society, but until the seventeenth century, to think or act other than in accordance with the sanctified modes of the past, was always considered improper, and quite often blasphemous and criminal. Not only the regulations of the church, but the laws of the country, were designed to check the progress of the intellect and to punish departures from ancient formularies and beliefs. The rulers and lawmakers were all concerned to keep public opinion where it had so long languished; and the laws of Church and State were instituted and united to repress the movements and chill the ardor of the mind.

The application and enforcement of the rule required that the party offered as a witness should be questioned, before the admission of any oath, as to his religious opinions, and if found deficient, rejected. One was trusted to tell, without oath, such *facts* as would enable the judge to decide if he was likely to speak truth when sworn. He was assumed to speak the truth without a sanction, in order that it might be determined if he would speak the truth with one. His veracity, without oath, was thus relied upon, and considered to be a convincing reason why it could not be relied upon if an oath were administered. Often, no doubt, one who from motives of prudence or a lack of principle, acknowledged himself a believer, when he really was not, was allowed to give evidence; but one whose very honesty would not permit that a false statement should be uttered as to his speculative beliefs, was rejected as unworthy of confidence. To an unprincipled

or a prejudiced witness, a premium was offered to follow up a false statement with a false oath; while to a person of extreme probity, though of unorthodox opinions, all avenues were closed against him to justify himself, or to advance the cause of justice.

To make more apparent the bygone close connection of religious and political intolerance, or rather the connection of religious intolerance with what ought to have been purely political concerns, it may not be unprofitable to refer to the remarkable change that came over the laws of England in the 17th century. Not until after King James ascended the throne in 1603, was that change perceptible by which politics became merged into theology.¹ Or, to speak more accurately, not until then were certain matters anterior to that time ever considered as offenses against spiritual authorities, severed, separated from religious, and merged into the domain of political offenses. For the first time many acts that had been looked upon as only crimes against church began to be regarded as crimes against the secular authorities. Before this, witchcraft, heresy and such offenses had been looked upon as solely spiritual, to be tried by the ecclesiastical courts, and visited with such disabilities and penalties as these courts saw proper to inflict. At that time the spirit of rationalism was far too weak to abolish these offenses altogether, but it was strong enough for them to be regarded as offenses against social rather than spiritual interests. And the inquiry into and punishment of them as crimes against the State, the recognition of the idea that they affected man as a citizen rather than as a creature, were but the necessary steps to that higher skepticism which has altogether discarded them from among the penal laws.

Not until the middle of the 18th century was the separation of religion and politics fully effected; and when it did occur, the clergy were left with small power as to the number or degree of the offenses reserved for their punishment. Thus were they deprived of their rights over the subject except in cases touching the domestic relations, in matters connected with the church establishment, and in testamentary causes. In none of these were the liberty and life of a person subjected to their jurisdiction, and their decrees could only be enforced by excommunication.² The same advance in knowledge that served to place the punishment of certain offenses within the province of politics rather than religion, served also to induce men to look upon perjury as more an infraction of social than spiritual duty; and served, furthermore, to the weakening of all legal rules that

¹Arnold's Lectures on Modern History, p. 232. ²Blackstone's Com., ch. 7, p. 87.

were the outgrowth of ecclesiastical doctrines. As a new standard of morality was put up, the old rules concerning moral competency were put down.

For hundreds of years before this time the principal offices and honors had been bestowed almost exclusively upon the priesthood, and they were for a long period the wealthiest and most influential classes in England and in Europe.¹ Judges, councillors, officers of finance and commanders of armies were chosen from the clergy; and during the important age when the common law was receiving its most enduring impress, it was administered and expounded by men who were deeply imbued both with religious principle and fanaticism. Consequently it becomes a source of small wonder that a defect of religious belief should have formed an insuperable barrier to the competency of one offered as a witness.

After the separation of politics and religion the high places of the land began to fall away from the ecclesiastics; the judicature of the realm began to be formed and administered by lawyers rather than priests; and thus was laid the foundation for the entire secularization of the law, and the means of effecting those rational and humane regulations, both private and international, that have so greatly advanced the welfare and enlightenment of all nations. But, before the growth of politics, as apart from religion was possible, it was requisite that some standard should be formed and set up among men, regarding justice and duty, other than entire belief in and submission to spiritual authorities. It is in the order of events that the severance of morals and theology should precede that of politics and theology; for when there was no standard for human conduct, except that builded by the teachers of dogmatic belief, there could be no received theories and speculations concerning the natural and inherent rights of individuals and citizens. Such, too, was really the case, for the separation of morals from theology was effected at least half a century earlier than the separation of theology and politics.²

Already has been remarked the anomalous condition of the Governments of modern times, wherein the legislators are commonly far behind the true thinkers and reformers of society. And a consideration of those imperfections in the law, which have to some extent been remedied—such as modifications in the marriage relations, and in evidence—as well as those abuses that yet remain to be rectified—

¹4 Turner's *Hist. Eng.*, p. 132.

²Buckle's *Hist. Civ.*, p. 305; *Leckey's Rationalism in Europe*.

such as the usury laws¹ and jury trial in civil causes—will most strongly impress this singular fact.

The extreme reluctance with which law-makers have approached and adopted these changes is altogether notorious, although a few eminent men and learned judges have long since pointed out the impolicy and uselessness of these effete regulations. A striking peculiarity connected with the dis-establishment of the old rules of law in this country is that the changes have almost uniformly commenced in the Western States and Territories, where the hold of custom and authority was weakest, and where the makers and judges of the law were for the most part young and enterprising men, whose education had not been of an ecclesiastical character.

Having selected those rules of evidence that have undergone radical changes in the near past, the endeavor has been to show that the jurisprudence of the earlier Britons, the Anglo-Saxons and Normans contained neither of these restrictive regulations; but that they were grafted upon the law after the introduction of the civil law into England, the attainment of almost unlimited control by the clergy, and after was commenced the system of judicial legislation for which English Judges have been so noted. Further, that the Judges who originated and established these rules were deeply imbued with the religious dogmatism of mediæval times, and that, in their eyes, faith in human testimony was greatly diminished or increased as the witness dissented from or believed in the religion of the age. That a too great reference to spiritual sanctions induced, in the law-makers, a corresponding neglect of the temporal and legal punishments of perjury; and these considerations, conjoined with the knowledge and practice of the civil law in the ecclesiastical courts, contributed to the formation of those restrictive rules. That the methods derived from the Saxons of reducing all things to an assumed certainty, through the instrumentality of forms, and so leaving little to the judgment or discretion of the triers of causes, was in no small degree conducive to the fixing of these rules. That the fundamental legal error of the middle ages was the attempt to form and maintain belief and opinion by law; when laws themselves should only be established by patient, tolerant and scientific inquiries into the nature of mind and matter. And, lastly, that with the severance of morals, politics and religion, jurisprudence assumed a novel phase; and instead of its rules being

¹During the last month of 1871, it was gravely urged in the Legislature of Georgia that the usury laws ought not to be abolished, because the *Jews* were commanded not to lend money at interest!

modeled after certain preconceived and assumedly unalterable conditions of life and destiny, they began to conform to the new developments of society, the real character and needs of man, and to the unchanging truths of moral and physical being.

The ramifications of the questions thus adverted to would lead to many of the most interesting and profound inquiries concerning evidence and the process of the development of its rules; but the limits of an article of this nature render it expedient that we should bring to a close an investigation that has enabled us to indicate, rather than adequately to examine, even so small a portion of those large and useful truths. It may be permissible, however, to remark before ending this incomplete portrayal, that the most sensible and philosophic rules which can guide an enlightened court of justice in the trial of causes should be almost precisely those that a wise, practical and educated man would adopt in the investigation of a question, at the real truth of which he had earnestly undertaken to arrive. In jurisprudence, it remains for a higher appreciation and more accurate development of the science of circumstances to mete out impartial and complete justice; as in society it remains for a better understanding of and greater regard for the equities of individuals to insure the right use of such portion of times as nature has here allotted to each of us, and the more equal distribution of the fruits of labor and participation in the pleasant things and places that are spread along the pathway of this mysterious pilgrimage.

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PRESENTMENT FOR PAYMENT.

SECTION I. *By Whom Presentment Made.* SECTION III. *Time of Presentment.*

SECTION II. *To Whom Presentment Made.* SECTION IV. *Place of Presentment.*

SECTION V. *Mode of Presentment.*

§ 1. The engagement entered into by the acceptor of a bill and the maker of a note is, that it shall be paid at its maturity—that is, on the day that it falls due, and at the place specified for payment, if any place be designated—upon its presentment. This engagement is absolute, but that of the drawer of a bill and the indorser of a bill or note is conditional, and contingent upon the due presentment at maturity, and notice in case it is not paid. The maker and acceptor are bound although the bill or note be not presented on the day it falls due; but the drawer and indorsers are discharged if such presentment be not made, unless some sufficient cause excuses the holder for failure to perform that duty.¹ It is important, therefore, to ascertain how the presentment should be provided for by the holder of the bill or note, lest by failure to observe the necessary precautions, the drawer and indorsers may be discharged, and the solvency of his debt destroyed or impaired. We shall consider, therefore, in order:

- (1) The person by whom the bill or note should be presented.
- (2) The person to whom the bill or note should be presented.
- (3) The time of presentment.
- (4) The place of presentment.
- (5) The mode of presentment.

The time of presentment will be more fully discussed hereafter, in a separate article on "Days of Grace," which will also embody the principles by which time is computed. And excuses for failure to make due presentment will also be set forth under a separate head.

¹ Chitty on Bills, (13 Am. ed.); Story on Notes, § 201; Bayly on Bills, ch. 7, sec. 1; Magruder vs. Bank of Washington, 3 Peters, 92.

SECTION I.

BY WHOM PRESENTMENT FOR PAYMENT MUST BE MADE.

§ 2. Any *bona fide* holder of a negotiable instrument, or any one lawfully in possession of it for the purpose of receiving payment, may present it for payment at maturity.¹ A notary public, or any agent duly authorized, may make presentment of the instrument for payment; and it is well settled that his authority need not be in writing.²

§ 3. Possession of a negotiable instrument, and indeed of any instrument, for the payment of money, is, as a general rule, evidence of the right of the party holding it to demand payment; even though it be payable to another, and is without his indorsement. The indorsement would be necessary to make the instrument negotiable, but it is not necessary to the validity of the payment. Not intending to part with the title, the payee may intrust the paper without indorsement to an agent to collect. A delivery to the agent is all that is necessary to vest him with authority to collect; and the delivery of it to the maker all that is necessary to evidence its payment. Therefore, if the maker pay a note presented by a party who claims to be the agent of the payee, but not having an indorsement, he will not be further bound to the payee if it turn out that such representation was false and fraudulent.³ And if the payee has indorsed it, he may present it, as it will be considered that he holds as agent, if not owner.⁴ Mr. Chitty goes to the extent of saying, that any person who happens, whether by accident or otherwise, (as by the failure of an agent,) to be the holder at the time the bill or note becomes due, and although he has no right to require payment for his own benefit, may and ought to demand payment, and give notice of the non-payment, so as to prevent loss.⁵

¹ *Leftly vs. Mills*, 4 T. R., 170; *Bachelor vs. Priest*, 12 Pick., 399; *Sussex Bank vs. Baldwin*, 2 Harrison, 487.

² *Seaver vs. Lincoln*, 21 Pick., 267; in which case presentment was made by a sheriff; *Shed vs. Brett*, 1 Pick., 40; *Hartford Bank vs. Barry*, 17 Mass., 94; *Freeman vs. Boynton*, 7 Mass., 483; *Sussex Bank vs. Baldwin*, 2 Harrison, 487; *Hartford Bank vs. Stedman*, 3 Conn., 489; *Bank of Utica vs. Smith*, 18 Johns., 230; *Williams vs. Matthews*, 18 Cowen, 252.

³ *Doubleday vs. Kress*, 60 Barbour, 181; *Cole vs. Jessup*, 10 N. Y., 96; *Cone vs. Brown*, 15 Rich (S. C.), 262. But see *Van Eman vs. Stanchfield*, 13 Minnesota, 75, where possession of an overdue note taken, when overdue, was held insufficient evidence of ownership.

⁴ *Bachelor vs. Priest*, 12 Pick., 399; *Story on Notes*, § 246.

⁵ *Chitty on Bills*, (13th Am. ed.) top p. 410—365; also see top 445—394. See also *Story on Notes*, § 246.

§ 4. Whether or not an indorser of a bill or note which has upon it a subsequent special indorsement, and no prior indorsement in blank is shown by mere possession of the paper to be entitled to demand payment, has been much questioned. There are a number of cases which hold that such an indorser cannot demand payment for the reason that it would seem from the face of the paper itself that he had parted with his title; and that a receipt from the last indorsee, or a re-indorsement to him would be necessary to re-establish it. This doctrine was laid down in an early case by the Supreme Court of the United States,¹ and some of the State tribunals have taken the same view;² but in a more recent case, the Supreme Court of the United States expressed the opposite opinion, which seems to us the correct one.³ Some of the cases hold that possession of the bill by a prior indorser is sufficient where the subsequent indorsements are cancelled;⁴ but the better view seems to be, and it is sustained by most respectable authority, that it makes no difference that the subsequent indorsements remain uncanceled.⁵ The party may not be still the proprietor in interest of the instrument, but he may be agent of the proprietor. His possession of it is sufficient evidence of his right to demand payment. Its delivery is a receipt to the payor, and it can not matter to him whether he has paid it to the principal or his agent.⁶

§ 5. It is intimated by Story that a different rule might apply where the note was not originally negotiable to order, or if negotiable, had been indorsed restrictively to a particular person only; and where, of course, in either case, the holder in possession is not the payee, or the special indorsee thereof. Under such circumstances, he

¹Welch vs. Lindo, 7 Cranch, S. C., 159.

²Thompson vs. Flower, 13 Mart. La., 301, where it was held that the last indorsement being cancelled was insufficient; see also Sprigg vs. Cuny, 19 Ib., 253. In Dehors vs. Harriott, 1 Show., 163, it was held, that a bill payable to A., and indorsed by him to B., and by B. to C., might be sued on by B.—it appearing, however, that C. had no interest. And in Mendez vs. Carreroon, 1 Lord Raymond, 742, the prior indorser suing the acceptor, was non-suited, it appearing that he had been sued by a subsequent indorser, and not appearing that he had paid the bill.

³Dugan vs. United States, 3 Wheat., 172 (1818).

⁴Bank of Utica vs. Smith, 18 Johns., 230; Bowie vs. Duvall, 1 Gill & J., 175; Chatauque Co. Bank vs. Davis, 21 Wend., 584; Dollfus vs. Trosch, 1 Denio, 367; Brinkley vs. Going, Breese, 288; Kyle vs. Thompson, 2 Scammon, 432.

⁵Dugan vs. United States, 3 Wheat., 172; Lonsdale vs. Brown, 3 Wash. C. C., 404; Picquet vs. Curtis, 1 Sumner, 478; Norris vs. Badger, 6 Cowen, 449.

⁶Bachelor vs. Priest, 12 Pick., 399; Bank U. S. vs. U. S., 2 Howard, 711; Jones vs. Fort, 9 B. & C., 764; Merz vs. Kaiser, 20 La. An., 377.

considers the mere production of the note is not ordinarily deemed a sufficient title or authority to demand payment.¹ This is not in accordance with the views of Chitty, or the *ratio decidendi* of cases already quoted; for while title to the instrument can not pass without the indorsement, the possession may still be evidence of agency to demand payment.

§ 6. If the holder die before the time for presentment for payment, it must be made by his personal representative.² If there be no personal representative at the time, presentment and demand within a reasonable time after his appointment will be sufficient to charge subsequent parties, although presentment and demand were not made at maturity.³

If the holder's estate has passed to an assignee in bankruptcy, the assignee should make presentment, or some person authorized by him.⁴

If the holder is a *feme sole*, and she has become a married woman at maturity, the presentment should be made by her husband; and a presentment by her, without his consent or authority, would be insufficient to charge the maker, or validate a payment. If the note belonged to a partnership, and one member be dead at maturity, presentment should be made by the survivor.

Whether or not Demand of Payment of a Foreign Bill by a Notary's Clerk, is sufficient as ground of protest.

§ 7. There is no doubt, as we have already seen, that any person, whether he be a notary or not, having a bill or note in possession, and whether the bill be foreign or inland, may demand payment and receive the amount due; and that a payment to such person by the drawee will discharge his obligation.

But in respect to foreign bills which are dishonored by refusal of acceptance or payment, the liability of the drawer and indorsers can only be preserved by a protest and notice—*notice alone* being necessary in the case of inland bills. And the custom is, when a foreign bill is dishonored, to cause it to be placed in the hands of a notary public, and again presented on the same day, if indeed it were not presented by a notary in the first instance, and to be protested by him for non-acceptance or payment, as the case may be.⁵ The question has been much debated whether or not a presentment by a No-

¹ Story on Notes, § 247. ² 1 Parsons' N. & B., 360; Story on Prom. Notes, § 249.

³ White vs. Stoddard, 11 Gray, 528.

⁴ 1 Parsons' N. & B., 360.

⁵ Brooks Notary, 3d ed., 71 (1867).

tary's clerk will suffice as the foundation of such protest, and the authorities are at war upon it.

In *Leftly vs. Mills*,¹ Buller, J., said: "I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a Notary Public, because he is a public officer." This *dictum* led Mr. Chitty in an early edition of his work to give apparent approval of the doctrine that the Notary *in person* must make the demand. A correspondence then ensued between him and the Notaries of London, the latter insisting "not only that by mercantile usage such presentment is regular, (by a Notary's clerk,) and is almost invariably adopted, but that as far back as the memory of the oldest Notary here can extend, it has always been the custom so to present them." And farther, that commercial business must instantly come to a stand if a different rule prevailed; because it would be just as impossible for all the bills in this country to be presented in person by notaries as by bankers. In reply, Mr. Chitty insisted, after careful consideration, that "it was clear, that strictly the notary himself must in all cases make demand of payment before he protests;"² though he observes elsewhere in his work, that "the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible; and the constant practice is for the clerk to make the presentment."³ And in a recent edition, it is said in a note by the learned editor, that the practice to allow the notary's clerk to make the demand, "is amply justified by the law of principal and agent, and not questioned in any case which has occurred before the courts of England."⁴ Professor Parsons quotes this language with seeming approbation,⁵ and there are considerations which go far to show that *at common law* demand by the notary's clerk is sufficient. In Scotland it is considered sufficient.⁶ Sufficiency of such demand, it has been said, is implied from a case in the Common Pleas,⁷ but it seems that in that case the bill was not foreign.

And in another English case,⁸ reported more fully in Chitty on Bills⁹ than by the reporters, and cited in New York,¹⁰ it would seem

¹ 4 Term R., 170 (1791).

² Chitty on Bills, (13th Am. ed.) 490 top p. 519.

³ Chitty on Bills, (13th Am. ed.) 333 top p. 374.

⁴ Chitty on Bills, (10th Eng. ed.) 355, note 4.

⁵ 1 Parsons' N. & B., 360.

⁶ Thomson on Bills, (Wilson's ed.) 311.

⁷ Poole v. Dica, 1 Bingham, N. C., 649 (1835); see 1 Parsons' N. & B., 641.

⁸ Vandewall v. Tyrrell, 1 Mood & Malk, 87, (22 E. C. L. R.) 258.

⁹ Chitty on Bills, (8th Lon. ed.) p. 495, note—13th Am. ed., top p. 519, note.

¹⁰ Onondaga County Bank v. Bates, 3 Hill, 57.

that Buller, J's *dictum* is considered the law of the realm. It appeared that the *notary's clerk* presented a foreign bill, drawn in Jamaica on London, and afterwards drew up the certificate of protest, which was signed and sealed by the *Notary himself*, in due form. It is stated in Chitty, though not by the reporters, that Lord Tenderden, C. J., said it was a void protest—that it was a false certificate—that the Notary had signed a paper stating "I presented and demanded," when it appeared in evidence that only his clerk had presented the bill, and he himself knew nothing of it.

State of the Authorities in the United States.

§ 8. If it were a question of original impression we should strongly favor the admissibility of demand by a notary's clerk; and upon principle we can not perceive any sufficient reason why it should not be allowed. In point of fact, the custom is almost universal for the demand to be made by the clerk, and whenever such custom is proved as existing in a particular place, it is recognized as controlling. When the demand is made by the clerk the responsibility of the notary is nevertheless as binding as the clerk is merely his agent; and every consideration of convenience would seem to sustain the practice.

But in the United States the courts have, almost without dissent, held that *at common law* it is necessary that the notary himself should make the demand of a foreign bill; and that in order to establish the sufficiency of a demand by his clerk a general custom, or a statutory enactment, authorizing such practice, must be proved.¹

In a recent case decided in Missouri² in an action upon a foreign bill drawn in St. Louis on New York, and in its sequel decided in New York³ in an action against the notary for negligence in not protesting it duly, the necessity of demand by the notary in person was illustrated in the most positive form.

In the first case (*Commercial Bank vs. Barksdale*), it appeared that the bill was protested in New York City on the 5th of January,

¹ *Sacridier vs. Brown*, 3 McLean, 481, (1844); *Ocean National Bank vs. Williams*, 102 Mass, 143; *Cribbs vs. Adams*, 13 Gray, 597; *Chenoweth vs. Chamberlain*, 6 B. Monroe, 60, (1845); *Bank of Kentucky vs. Garey*, 6 B. Monroe, 629, (1846); *McClane vs. Fitch*, 4 B. Monroe, 600, (1844); *Carter vs. Brown*, 7 Humph., 548; *Commercial Bank vs. Barksdale*, 36 Miss., 563, (1865); *Wittenberger vs. Spalding*, 33 Miss., 421; *Commercial Bank vs. Varnum*, *American Law Register*, July, 1872; *Locke vs. Huling*, 24 Texas, 311.

² *Commercial Bank vs. Barksdale*, 36 Mo., 563, (1865).

³ *Commercial Bank vs. Varnum* *Law Register*, July, 1872.

1861; that payment was demanded by Turney, a notary; that the protest was made out by Varnum, also a notary, who was a copartner with Turney in the notarial business. Holmes, J., delivering the opinion, said: "It is well established that the presentment and demand must be made by the same notary who protests the bill; it can not be done by a clerk, or by any other person as his agent, though he be also a notary. The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character."

In court, the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness.

§ 9. In the case in New York, the Commercial Bank sued the notary, Varnum, into whose hands the bill was placed for demand and protest if necessary, for negligence in not duly performing his

¹"The notarial protest must state facts known to the person who makes it, and he can not delegate his official character or his functions to another. The presentment and protest are governed by the law of the place where the bill is payable; and on this principle it has been held that where the statute law of the State (as in Louisiana, authorizes notaries to appoint deputies, a protest made by such deputy, duly appointed, would be recognized as sufficient, (*Carter vs. Brown*, 7 Humph, 548). But no case seems to have gone further than this: Such deputy may be considered as having a semi-official character, and sufficient authority by force of the statute; but without some change in the general rule of law, one notary can neither delegate his functions nor impart his own official character to another. Here, two notaries were in partnership in general business, and one of them undertook to present the bill and make the demand, and the other to draw up the protest and give the notice. They were both notaries, but as such they were distinct public officers, and there can be no partnership in such matters. No law or custom was proved to have existed in the State or city of New York, which changes the general rule of the law merchant on this subject. It must follow that the protest made by Varnum can have no validity nor will that made by Turney any more avail. It seems to be clearly established by the general current of authority that the protest must be made on the same day with the presentment and demand, though a noting of the protest on the bill itself may be regarded as an incipient protest, or preliminary step towards a protest which may be completed afterwards, at any time, by drawing up the protest in form. Here there was no noting of the bill for protest, nor any memorandum marked on the bill by Turney; nor is there any proof of any distinct note, entry or memorandum of protest made by him on that day, in any other way than upon the bill itself. It would appear that he did not make the demand for the purpose of protesting the bill himself but as the agent of his partner, the other notary. He neither protested the bill nor noted it for protest at the time; and his drawing up of a protest, long afterwards, must be regarded as having no basis of contemporaneous fact or present authority and as being entirely void."

function. And it appeared that he gave the bill to his partner, Turney, who presented it for payment; and on the same day an entry was made in Varnum's protest book under the joint supervision of Turney and himself, stating that the bill was presented and protested by Varnum. This was signed by Varnum. Turney's name not being mentioned, but his initials were placed opposite. It was held that by the common law the defendant would be liable, but that evidence of a general custom would be admissible to show that in New York the practice for a notary's clerk to make the demand was recognized.¹

To the same effect are numerous cases;² and we know of no case in the United States in which a contrary doctrine has been distinctly held; so that however weighty may seem the considerations which uphold a contrary view, in this country the principle may be regarded as settled.

Distinction taken in Kentucky between Clerk and Deputy.

§ 10. In Kentucky a distinction exists between the inferences to be drawn from a demand by the notary's clerk and by his deputy, which seems to us too refining, and not to be sustained. There it was held that proof of a general custom for the notary's clerk to make demand prevailing in New Orleans was admissible; and proof of presentment by the clerk sufficient.³ In a subsequent case where the presentment was also made in New Orleans by a notary's clerk, it was held insufficient as foundation for the protest, because no evidence of the custom authorizing it appeared in the record.⁴ These two decisions were doubtless correct; but in a still later case it was held that where the notary certified respecting a foreign bill that he "presented the bill for payment by his deputy Auguste Commandeur" it was sufficient, although there was no evidence that by the laws of Louisiana a deputy was authorized to perform such functions. The court held that official authority or authority of the principal might be implied in the deputy, when no such authority would be implied in a mere clerk. And while it could find no authority, as was observed, for presentation by a deputy, it considered that the impracticability of the notary acting in person in a great commercial city in all cases, and the seeming necessity for authorizing action by deputy,

¹Commercial Bank vs. Varnum.

²Chenoweth vs. Chamberlain, 6 B. Monroe, 60, (1845); Ellis, Adm'r, vs. Commercial Bank, 7 Howard, (Miss.) 294, (1843); Sacridier vs. Brown, 3 McLean, 381, (1844).

³McClane vs. Fitch, 4 B. Monroe, 600, (1844).

⁴Chenoweth vs. Chamberlin, 6 B. Monroe, 60, (1845).

furnished *prima facie* presumption that the presentation and protest were made in accordance with the law or usage of New Orleans.¹

This decision is directly controverted by the cases in Missouri and New York, before cited; and seems to us objectionable on the double ground that the notary who makes the presentment must also make the protest, and that departures from the common law, whether by statute or custom, must be proved. Indeed, the courts of Kentucky could take no judicial notice of a statute of Louisiana, which must be placed before it in evidence in authentic form before it can be noticed.

The Rule applies to Protests of Inland Bills and Promissory Notes when Protest of such Instruments is Allowable.

§ 11. The rule requiring the demand and protest to be made by the notary in person applies, in order to give it full force and effect, although the instrument protested may be an inland bill or a promissory note. As to them, no protest is *necessary*, but by statute in many of the States it may be made, and be accorded the same effect as in the case of a foreign bill. But in such cases, in order to possess the same effect, it must be made by the same person, and based upon the same preliminary notarial demand, as in the case of a foreign bill. For *quoad* the form and effect of the protest they are placed on the same footing as foreign bills. Thus, in New York, where the protest certified that the notary *caused* the note to be presented, was held insufficient because he could not delegate his functions to another; and that indeed such certificate would be objectionable as evidence of presentment, because the notary had no personal or official knowledge of the fact, and it was but hearsay evidence at most. So it was held that certificate of the notary that the note was presented by his clerk would be defective on like grounds.²

But it is to be observed respecting inland bills and promissory notes that as no *protest* is necessary; and although no protest when relied on will be valid unless made by the notary in person, yet demand of payment of an inland bill or of a promissory note may be made by the clerk, which will be sufficient as the foundation of *notice* from the notary, or other person acting for the holder. But the testimony of the clerk would be necessary to show the due presentment

¹ Bank of Kentucky vs. Gary, 6 B. Monroe, 629, (1846).

² Onondaga County Bank vs. Bates, 3 Hill, 56, (1842).

³ Sheldon vs. Benham, 4 Hill, 129, (1843); to same effect, Warnick vs. Crane, Denio., 460, (1847).

and the testimony of the notary or other party acting for the holder to show due transmission or service of the notice.¹

Statutory Authority or General Custom may be Proved.

§ 12. It is clear upon principle, and it is agreed by the authorities that where there is a statute authorizing the demand or protest to be made by a notary's deputy or clerk, or by any other official; or where there is a general custom recognizing such practice, it may be proved; and that in such cases it will be sufficient to show that the statute or custom was observed. Thus it has been held by the United States Supreme Court that where, as in Mississippi, (as was proved,) a justice of the peace is authorized by statute to perform the functions and duties of a notary, his act of protest is equally valid as that of a notary. "*Quoad hoc*," said the Court, "he acts as a notary."² And so where it was in evidence that by the laws of Louisiana, each notary was authorized to appoint one or more deputies to assist him in making protests and delivering notices; and the protest on its face stated that the notary A., by his deputy B., presented the bill, etc., it was held sufficient.³

So it has been held in a number of cases that evidence of a custom for a notary to act by his clerk is admissible,⁴ and in Massachusetts the doctrine was well expressed by Bigelow, J.⁵

In Virginia the Court of Appeals were unanimous as to this doctrine, but divided equally as to whether or not, at common law, presentment by the notary's clerk was sufficient.⁶

It is quite clear that in no case can the clerk make the protest, however it may be determined as to the presentment.⁷

¹Hunt vs. Maybee, 3 Selden, 269, (1852). ²Burke vs. McKay, 2 Howard, 66, (1844).

³Carter vs. Union Bank, 7 Humph., 548, (1847).

⁴Commercial Bank vs. Varnum; Commercial Bank vs. Barksdale, 36 Misso, 563; Willenberger vs. Spalding, 33 Misso., 421; Nelson vs. Fotteral, 7 Leigh, 179.

⁵In Cribbe vs. Adams, 13 Gray, 600, Bigelow, J., said: "By the common law, as we understand it, and according to the uniform practice in the commonwealth, the duties of a notary must be performed personally, and not by a clerk or deputy. He is a sworn officer, clothed with important public duties, which in their nature imply a public confidence and trust. Doubtless by well settled usage in some places, and in others by express provision of statute, notaries are authorized to employ clerks or deputies to perform official acts coming within the sphere of their duty, and are employed to certify and authenticate their acts by their own notarial certificates in like manner as if such acts had been performed by themselves personally. But such usage or provision of law is a fact to be proved by evidence. At the trial of this case the plaintiff offered no evidence that a notary in Louisiana (where the bill was protested) was authorized either by usage or statute to employ a deputy, or to authenticate his acts by his own certificate."

⁶Nelson vs. Fotteral, 7 Leigh, 180.

⁷Sacridier vs. Brown, 3 McLean, 481.

Custom for Notary's Clerk to make Presentment must be shown to relate to Foreign Bills.

§ 13. There may be a custom for Notaries' clerks to make presentment as foundation of protest of inland bills and of promissory notes, and yet it may not extend to include foreign bills. And when protest of a foreign bill has been based on presentment by a notary's clerk, the plaintiff must not only show a general custom or practice for the clerk to make presentment of bills and notes, but must show distinctly that the custom extended to foreign bills. As said in a recent case in Massachusetts, by Ames, J.:¹ "The plaintiff wholly failed to prove the existence of any well-settled local usage in New York that would authorize a notary in the case of a foreign bill to make a presentment and demand of payment by his clerk or deputy, and to certify and authenticate notarial acts so performed, in the same manner as if he had performed them himself. The witnesses who testify that it is customary in the city of New York for the clerks of notaries to present and demand payment of drafts, and for notaries to protest upon such presentment and demand, wholly fail to give any information upon the point whether that custom applies to and includes the case of foreign bills. One of them says that his attention had never been called to that distinction, and the other makes no allusion to it. It hardly need be said that a local usage, in derogation of the general rules of law, requires clearer and better evidence of its existence and validity."

In Pennsylvania, where a promissory note was dishonored, and the plaintiff offered in evidence the certificate of a notary by which it was certified that the notary had given the indorser notice of non-payment; but the notary on the trial testified that the certificate was in the hand-writing of his son, then absent in the West Indies; that his son had attended to the presentment and notice, and he himself had no personal knowledge on the subject. This testimony was not *objected to*, and it was held that under the peculiar circumstances of the case, and the Pennsylvania statute making notarial certificates competent evidence, that the certificate was admissible as matter of evidence, to be weighed with the rest of the testimony by the jury.²

¹*Ocean National Bank vs. Williams*, 102 Mass., 143.

²*Stewart vs. Allison*, 6 Serg't & R., 324.

SECTION II.

TO WHOM PRESENTMENT FOR PAYMENT MUST BE MADE.

§ 14. Presentment for payment must be made to the drawee or acceptor of the bill, or maker of the note, or to an authorized agent. A personal demand is not necessary, and it is sufficient to make the demand at his usual residence, or place of business, of his wife or other agent; for it is the duty of an acceptor or promisor, if he is not present himself, to leave provision for the payment of his bills or notes.¹

There is no doubt that a clerk found at the counting room of the acceptor or promisor, is a competent party for presentment for payment to be made to, without showing any special authority given him.² But where the protest stated the mere fact of presentment "at the office of the maker," it will be considered insufficient, as not showing that the paper was presented to party at the office, authorized to pay or refuse payment.³ A demand upon the servant of the owner "who used to pay money for him," was held sufficient in England.⁴

It has been indicated by Chitty in his work on Bills,⁵ that while in making presentment for acceptance the holder should, if possible, see the drawee personally, in the presentment for payment it is not necessary; it being sufficient if it be made at the house of the acceptor. But we concur with Story,⁶ that there is no just foundation for the distinction. If, indeed, the drawee does not happen to be present when the call is made at his house, or counting-room, to present the bill for acceptance, the holder, it seems, is not bound to consider it as a refusal to accept, but may wait a reasonable time for the return of the drawee who has as yet incurred no obligation respecting the bill, and may indeed be ignorant of its existence. The holder may even wait until the next day to renew his call to present for acceptance.⁷ But no such delay is allowable in making presentment to the acceptor for payment.

It is the duty of the acceptor who is the principal debtor to provide for the payment of the bill; and if he is not in himself, and

¹ Mathews vs. Haydon, 2 Esp., 509; Brown vs. M'Dermot, 5 Esp., 265.

² Stainback vs. Bank of Virginia, 11 Grat., 260; Nelson vs. Fotherall, 7 Leigh, 180; Draper vs. Clemons, 4 Misso., 52; Stewart vs. Eden, 2 Caines, 121; Reynolds vs. Chetler, 2 Camp., 596.

³ Nave vs. Richardson, 36 Misso., 130.

⁴ Bank of England vs. Newman, 12 Mod., 241.

⁵ Chitty on Bills (13th Am. ed.)

⁶ Story on Bills, (Bennett's ed.) § 350.

⁷ Ibid.

there is no one present to answer for him when the holder calls at his house, or counting-room, the bill should be treated as dishonored, and protested for non-payment.

When Acceptor or Maker is dead.

§ 15. If the acceptor or maker be dead at the time of the maturity of the bill or note, it should be presented to his personal representative, if one be appointed, and his place of residence can, by reasonable inquiries, be ascertained.¹ If there be no personal representative, then presentment should be made, and payment demanded, at the dwelling-house of the deceased, if the instrument were payable generally.² But if it was drawn payable at a particular place, then it will be sufficient that it was presented at such place.³

In Partnership Cases.

§ 16. Presentment of a bill drawn upon or accepted by, and of a note executed by, a co-partnership firm, is sufficient, if made to any one of the members of such firm.⁴ And if the signature of the parties entitled to presentment be apparently that of a partnership, as for instance, if signed "Waller & Burr," presentment to either is sufficient.⁵

Even after the dissolution of the firm, presentment to any one of the partners is sufficient, for as to the bill or note upon which they are liable, the liability continues until duly satisfied or discharged. As said in Maryland, where presentment of a partnership note was made to one of the firm, by Archer, C. J.:⁶ "It might be sufficient to say that this dissolution had, by no evidence in the case, been brought home to the knowledge of the holder of the note. But we do not desire to determine the question on this ground, because we are clearly of opinion that a demand on one of the partners was sufficient, as each partner represents the partnership. Before a dissolution, it clearly would not be necessary to make a demand on both, nor could it be necessary after a dissolution, for the partnership as to all antecedent transactions, continues until they are closed."

¹ Story on Notes, § 253-241; Magruder vs. Union Bank, 3 Peters, 87; Juniata Bank vs. Hale, 16 Serg't & R., 167.

² Story on Notes, § 253.

³ Boyd's adm'r vs. City Savings Bank, 15 Grat., 501; Price vs. Young, 1 Nott & Mc., 438; Philpot vs. Bryant, 1 Mood & R., 754; 3 Carr & P., 244; 4 Berg., 717; Thomson on Bills, (Wilson's ed.) 285.

⁴ Branch of State Bank vs. McLeran, 26 Iowa, 300; Shed vs. Brett, 1 Pick., 401; Thomson on Bills, (Wilson's ed.) 281.

⁵ Erwin vs. Downs, 15 N. Y., (1 Smith,) 375. ⁶ Crowley vs. Barry, 4 Gill, 194.

And it has been held that demand on the agent of one partner, after dissolution, in the absence of the partner, was sufficient.¹

§ 17. In the event of the death of one of the members of the firm to which presentment should be made before the maturity of the bill or note, the presentment should be made to the survivors, and not to the personal representative of the deceased, because the liability devolves upon the surviving partner.²

Where there are several Promisors not Partners.

§ 18. When the note is executed by several joint promisors who are not partners, but liable only as joint promisors, it has been held, and, as we think, correctly, that presentment should be made to each, in order to fix the liability of an indorser.³ But a difficulty presents itself which might seem to characterize this doctrine as harsh and unreasonable, and which has caused it to be held that *quoad hoc* the promisors are to be regarded as partners, and presentment to one equivalent to presentment to all. "Now suppose," it has been said in Ohio, by Hitchcock, J.:⁴ "the makers resided in different States, or in different and distant parts of the same State, how could demand be made of all, in order to charge an indorser? It must be made on the day the note falls due, or where days of grace are allowed, on the last day of grace. Will it be said that the demand can be made at different and distant places on the same day, through the agency of letters of attorney? I believe such a practice has not been heard of, at least we have found nothing like it in the books." And the court concluded that they were to be regarded as partners. These views are more plausible than satisfactory, and the argument *ab inconvenienti* is well presented. But joint promisors are no more partners than joint indorsers. To construe them to be partners is to make a new contract between them, and to vary the condition precedent of the indorser's liability. And although it might be more convenient if they were partners, the inconvenience in enforcing their contract does not change it.

¹ Brown vs. Turner, 15 Ala., 832.

² Cayuga County Bank vs. Hunt, 2 Hill, 635; Story on Bills, §§ 346-362; 1 Parsons N. & B., 362.

³ Blake vs. McMillen, 22 Iowa, 358; Union Bank vs. Willis, 8 Metc., 504; Arnold vs. Dresser, 8 Allen, 435. Nelson, C. J., in Willis vs. Green, 5 Hill, 232, a case respecting notice to joint indorsers, says: "I do not see but the case of joint indorsers, not partners, stands on the same footing as that of joint makers of a note who are not partners; and in respect to them it is settled that presentment must be made to each, in order to charge an indorser."

⁴ Harris vs. Clark, 10 Ohio, 5.

If they were in different places at the maturity of the note, and it could be only presented to one, due diligence would only require its presentment to the others, in such time as they could be reached; and the impossibility of presenting to all on the day of maturity, would excuse non-presentment to those at other places. Such, at least, is our conception of the true solution of the question, and it is borne out by high authority, and certainly by much more satisfactory reasoning than that above quoted.¹

§ 19. Where the note is *several*, as well as *joint*, the indorser might be held as indorser of the maker to whom the note was duly presented, as the holder would have the right to treat the note as the several note of each maker. But he would have lost recourse against the indorser as upon the joint note of the co-makers, or the several note of the maker as to whom no presentment was made, or excuse given.²

In the event of the death of a joint maker, presentment should be made to the survivor, upon whom the debt devolves. If the note were several also, it might be different, as the holder is at liberty to elect "upon whom he will make demand."³

SECTION III.

TIME OF PRESENTMENT FOR PAYMENT.

Upon what Day Presentment should be Made.

§ 20. In respect to the maker of a note, and the acceptor of a bill, it is not important upon what day the presentment is made, provided it be made at some time before the statute of limitations bars action against them.⁴ And provided, also, that the note is not made, nor the bill drawn or accepted payable at a certain place. In such cases only is it desirable that *as respects the maker or acceptor* the bill or note should be presented on the exact day of its maturity; and even in such cases it makes no difference that the presentment was not punctually made on that very day, unless the maker or acceptor should suffer some loss or damage by the delay.

§ 21. In respect, however, to the drawer of a bill, and the indorser of a bill or note, it is essential to the fixing of their liability that the

¹ See 1 Parsons N. & B., 363, note w; Story on Notes, § 239, and especially § 255, and note 2. There seems to be no English precedent on the question.

² Story on Promissory Notes, § 255, note 2. ³ Story on Prom. Notes, § 256.

⁴ Chitty on Bills, (13th Am. ed.) *354, top. p. 396.

presentment should be made on the day of maturity, provided it is within the power of the holder to make it.¹ If the presentment be made before the bill or note is due, it is entirely premature and nugatory, and so far as it effects the drawer or indorser, a perfect nullity.² And if it be made after the day of maturity, it can, as matter of course, be of no effect, as the drawer or indorser will already have been discharged, unless there were sufficient legal excuse for the delay.³ The evidence must be distinct as to the promptness of the presentment or the excuse for delay.⁴

§ 22. If a note be payable in instalments, the presentment should be made on each consecutive instalment as it falls due, as if it were (as in fact it is legally considered,) a separate note in itself.⁵ It would be different, probably, if the condition were annexed to the note that upon failure to meet any instalment, the whole should fall due, in which case notice should be communicated to the drawer or indorser that the whole sum was due, and the holder looked to him for payment.⁶

At what Hour of the Day Presentment should be Made.

§ 23. When the bill or note is made payable at a bank, it should be presented during banking hours, the parties executing their paper payable at a particular place, being bound by its usage; and in such case a presentment after banking hours is insufficient.⁷ But it is settled that when a bill or note is payable at a bank, a demand made at the bank after banking hours, the officers being there, and a refusal, the cashier or teller stating that there were no funds, is sufficient.⁸

And likewise, if any person is left at the bank to give an answer,⁹ and it matters not that the notary making the presentment enters by the back door.¹⁰

¹ 1 Parsons N. & B., 373.

² Griffin vs. Goff, 12 Johns. 423; Jackson vs. Newton, 8 Watts, 401; Farmers' Bank vs. Duval, 7 Gill & J., 78; Mechanics' Bank vs. Merchants' Bank, 6 Metc., 13.

³ Windham Bank vs. Norton, 22 Conn., 213.

⁴ Robinson vs. Blen, 20 Maine, 109.

⁵ Oridge vs. Sherborne, 11 M. & W., 374. ⁶ See 1 Pars. N. & B., 374.

⁷ 1 Pars., 419; Parker vs. Gordon, 7 East, 385; Elford vs. Teed, 1 Maule & S., 28; Thomson on Bills, (Wilson's ed.) 302; Byles on Bills, (Sharswood's ed.) 340; Story on Bills, §§ 236, 349; Story on Notes, § 235.

⁸ Bank of Syracuse vs. Hollister, 17 N. Y., 46; Bank of Utica vs. Smith, 18 Johns., 230; First National Bank vs. Owen, 23 Iowa, 185; Goodloe vs. Godley, 13 Smedes & M., 227; Cohen vs. Hunt, 2 Id., 227; Flint vs. Rogers, 15 Maine, 67.

⁹ Garnett vs. Woodcock, 1 Stark, 475; 6 Maule & S., 44.

¹⁰ Commercial Bank vs. Hamer, 7 Howard, (Miss.), 448.

In an action against the acceptor on a bill payable in London, and accepted at D. & Co's, a presentment at D. & Co's, between 7 and 8 o'clock in the evening, was proved, and that a boy returned as answer, "no orders." Lord Ellenborough said that if the banker appointed a person to give an answer, a presentment at any time while that person was in attendance, was sufficient.¹

Where, by usage of the bank at which the instrument is payable, the payor is allowed until the expiration of banking hours for payment, a demand made before that time, unless the instrument continues in bank until banking hours have expired, is insufficient.²

If the bill or note be payable "at bank," no particular bank being named, the hour will be determined by the usual banking hours at the several banks of the place where it is payable.³ It is for the jury to say what are business hours, and in fixing them otherwise than in respect to the banks, they are to have reference to the general hours of business at the place, rather than to the custom of any particular trade.⁴

§ 24. When the instrument is not payable at a bank, presentment may be made at any reasonable hour during the day—during what are termed "business hours," which, it is held, range through the whole day to the hours of rest in the evening.⁵ But the mere fact that the payor had retired to rest would not vitiate the presentment, unless it was at an hour when, according to the habits and usages of the community, it might be expected that he had retired.⁶ If the presentment be during the hours of rest it will be entirely unavailing.⁷

§ 25. When presentment is *at the place of business* it must be during

¹ Garnett vs. Woodstock, *supra*.

² Planters' Bank vs. Markham, 5 How., (Miss.) 397; Harrison vs. Crowder, 6 Smedes & M., 464.

³ U. S. Bank vs. Carneal, 2 Peters, 543; Church vs. Clark, 21 Pick., 310.

⁴ Thomson on Bills, 302.

⁵ Nelson vs. Fotherall, 7 Leigh, 194; Cayuga County Bank vs. Hunt, 2 Hill, 635.

⁶ Farnsworth vs. Allen, 4 Gray, 453, in which case presentment was made at 9 P. M., at the maker's residence, ten miles from Boston. He and his family had retired. Held sufficient. In Barclay vs. Bailey, 2 Camp., 527, Lord Ellenborough sustained a presentment made as late as 8 P. M., at the house of a trader.

⁷ Wilkins vs. Jadis, 2 B. & Ad., 188, in which case the bill was presented at the place named in the acceptance, between 7 and 8 P. M., but the door was shut and no one answered. Dana vs. Sawyer, 22 Maine, 224, in which presentment was a few minutes before midnight, the maker being waked up at his residence.

the hours when such places are customarily open,¹ or at least while some one is there competent to give an answer. It is only when presentment is at the residence that the time is extended to the hours of rest.² But presentment at any hour can not be considered unreasonable if any person competent to answer be found there who gives an answer refusing to pay.³

Where, however, a bill was presented for payment at a bank in the morning, and refused for want of effects, and afterwards presented at six o'clock in the evening, (effects being lodged in the meantime,) and again refused, business hours having closed at five o'clock, it was decided that they were not liable in damages to the drawer, their customer, for the refusal—they had paid the bill and expense of notary next day.⁴

Within what time Bills and Notes specifying no time of Payment must be Presented for Payment.

§ 26. All the text writers and the adjudicated cases tell us that a bill payable at sight, or at a fixed time after sight, or on demand; and a note payable on demand, must be presented for acceptance or payment, as the case may be, "within a reasonable time." But in determining what is reasonable time we are left a riddle which it is difficult to solve. The maker of the note, who is the principal debtor, is bound to pay whenever payment is demanded, no matter what period of time may have elapsed since its execution, and when a bill payable at so many days after sight has been presented and accepted, the acceptance fixes the period at which it must be presented to the acceptor for payment. But within what time such a bill must be presented in order to preserve the liability of the drawer and indorsers, and the note presented in order to preserve that of the indorsers is a problem which has puzzled courts and juries no little. And an eminent jurist has said in respect to time within which it is necessary to present for payment a note payable on demand *in order to charge an indorser*, that "it depends upon so many

¹ *Lunt vs. Adams*, 17 Maine, 230, in which case presentment at 8 A. M., at the maker's storehouse was held insufficient; see *Dana vs. Sawyer*, 22 Maine, 244. Presentment at 8 p. m., at an attorney's office, was held sufficient in *Triggs vs. Neunham*, 1 Car. & P., 631; and in *Morgan vs. Davison*, 1 Stark., 114, presentment at a counting-room between 6 and 7 p. m., was held sufficient.

² In *Barclay vs. Bailey*, 2 Camp., 427, presentment at 8 P. M., at the maker's residence was held sufficient.

³ *Henry vs. Lee*, 2 Chitty's Rep., 125, *Garnett vs. Woodcock*, 1 Stark R., 475; 6 Maule & S., 44; Thomson on Bills, 303; Chitty, (13th Am. ed.) 438.

⁴ *Whitaker vs. Bank of England*, Tyrwh., 268.

circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."¹ Some of the text writers treat of bills, promissory notes, bankers' cash notes, and checks, as falling within one rule; and a failure to discriminate between these various classes of commercial paper has confused the decisions upon the subject, and left them in a state of contrariety and antagonism which it is impossible to reconcile. In a previous article on presentment for acceptance we have discussed the question of reasonable time in respect to the presentment for acceptance of bills; and the doctrines there laid down are almost entirely applicable to presentment of bills for payment. The reasonable time for presentment of checks, which are of a different nature, has also been discussed; and we shall endeavor now to give the principles which determine within what time a bill or note payable on demand must be presented for payment.

§ 27. In the first place, respecting bills payable on demand: Such instruments would seem to be closely assimilated to bank checks, and to contemplate the immediate payment of the amount called for. They are payable immediately on presentment, without grace, and if the drawee and the payee or indorsee reside in the same place it is laid down by a number of the authorities that they must be presented within business hours of the day on which they are drawn in order to hold the drawer in the event of the failure of the drawee to honor them.² And that if the drawee resides in a different place they must be forwarded by the regular post of the day after they are received.³

§ 28. Promissory notes payable on demand would seem to stand on a different footing. It is difficult to perceive why the maker should execute his promise to pay on demand if immediate payment were intended; and although the holder *may* present it at once for payment, if he be so inclined, this would seem to be a privilege rather than a duty. Why not pay the money at once, if the note must be presented at once in order to charge the indorser? In England, a note on demand is regarded as a continuing security which it is not necessary to present for payment on the next day when the parties reside in the same place; or to send by the post of the next day when they reside in different places;⁴ but in the United States, as a general rule, a different view is taken, and payment must be speed-

¹ Shaw, C. J., in *Seaver vs. Lincoln*, 21 Pick., 267.

² Byles on Bills, (Sharswood's ed.) 337-8; Thomson on Bills, (Wilson's ed.) 297; Chitty on Bills, (13th Am. ed.) 431; Piner vs. Clary, 17 B. Monroe, 645.

³ *Ibid.*, Chitty, 432.

⁴ Brooks vs. Mitchell, 9 M. & W., 15.

ily demanded, in order to preserve recourse against the indorser, and to preserve the note from defenses which may be made against overdue paper.¹ It is better in all cases where the question is not settled, to decline taking a note on demand by indorsement—or, if taken, to present it with the utmost dispatch.

When Note Given for a Loan.

§ 29. When the note payable on demand has been given for a loan of money, it would then seem clear that it was intended as a continuing security, and the immediate presentment would not be necessary in order to charge the indorser.² In Scotland, as well as in the United States,³ this view has been taken; and though high authority has maintained a different doctrine,⁴ we can but regard it as one that strikes the mind with the utmost force. Where demand was not made for twenty-one months, it has been considered sufficient in such a case;⁵ and in Scotland, where a bill on demand was granted as a loan, and not as a remittance, presentment six months after date was held sufficient.⁶

Notes Payable on Demand "With Interest."

§ 30. When the note is payable on demand with interest it would seem to have been intended as a continuing interest bearing security; but upon this question, as upon those already discussed respecting notes payable on demand, the authorities are in painful contrariety.

In England where a note of £1,000 payable on demand with in-

¹ See 1 Parson's N. & B., 376-7.

² Thomson on Bills, (Wilson's ed.) 301, citing *Leith Banking Company vs. Walker's trustees*, 14 S. D. B., 332.

³ *Vreeland vs. Hyde*, 2 Hall, 429. The court saying: "The rule requiring presentment within a reasonable time was intended for and is applicable to negotiable instruments made for commercial purposes only. It was not intended for cases of suretyship, or notes of a like description, and the present one is evidently excluded from the rule by the peculiar circumstances attending it. Here the holder was an old man not connected with business, residing at some distance from the city. The defendant knew these circumstances, and can not claim any peculiar indulgence from a consideration of the facts, as each case must be governed by the circumstances attending it; in this there must be judgment for the plaintiff."

⁴ 1 Parson's N. & B., 380, note d; Bayley on Bills, ch. VII., p. 142, note; *Perry vs. Green*, 4 Harrison, 61; *Sice vs. Cunningham*, 1 Cowen, 397, in which case a delay of five months, all the parties residing in New York city, was held to discharge the indorser; *Martin vs. Winslow*, 2 Mason, 241, seven months' delay held fatal; *Field vs. Nickerson*, 13 Mass., 131, seven months' delay held fatal, although the accommodation indorser was told by one of the makers that the note would not be demanded immediately.

⁵ *Vreeland vs. Hyde*, 2 Hall, 429.

⁶ Ante note, *supra*, Thomson, 301.

terest had been indorsed and transferred several years after its date; and the question was whether the indorsee took it subject to equities between prior parties. The court said: "If a promissory note, payable on demand, is after a certain time to be treated as over-due, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note, payable on demand, is intended to be a continuing security. It is quite unlike the case of a cheque which is intended to be presented speedily."¹ The circumstance that the note bore interest did not control the decision of the court; but in New York that feature was considered material; and where such a note was transferred three or four weeks after date, it was said, "it would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, a year, etc;" and was held that the note was not over-due so as to admit a plea of want of consideration.² But in a late case, where the note, payable on demand, with interest, was transferred nearly three months after date, the parties having their places of business in the same street of the same city; it was held over-due, so as to admit equities;³ and in an earlier case a similar note, transferred two and a half months after date, was held open to defense of part payment before transfer.⁴ In Vermont the note was held over-due at time of indorsement, ten months after date.⁵

§ 31. In respect to the time within which a note, payable on demand, with interest, must be presented in order to charge an indorser the like contrariety exists. Eight months' delay was held to discharge an indorser in one case;⁶ seven months in another;⁷ five months and a half in another, all the parties residing in the same place.⁸

On the other hand a delay of twenty-one months to present a note payable on demand with interest, has been held not to discharge the indorser.⁹ And in a later case in New York, where the note, payable on demand, with interest, was indorsed for accommodation at the time of its date, which was the 5th of May, 1852; and the interest was paid by the maker for three years; and demand of payment was

¹ Brooks *vs.* Mitchell, 9 M. & W., 15; see also Barough *vs.* White, 4 B. & C., 325; Gascogne *vs.* Smith, 1 McClelland & Younge, 338.

² Wethey *vs.* Andrews, 3 Hill, 582. ³ Herrick *vs.* Woolverton, 41 N. Y., 581.

⁴ Losee *vs.* Dunkin, 7 John.'s R., 70. ⁵ Morey *vs.* Wakepeld, 41 Vt., 24.

⁶ Field *vs.* Nickerson, 13 Mass., 131. ⁷ Martin *vs.* Winslow, 2 Mason, 241.

⁸ Sice *vs.* Cunningham, 1 Cowen, 397; see, also, Perry *vs.* Green, 4 Harrison, 61.

⁹ Vreeland *vs.* Hyde, 2 Hall, 429, (see ante.)

made, and refused, and notice given on the 24th of December, 1855, it was held that the indorser was still bound.¹

Seven days' delay was not considered too long in Massachusetts, under the circumstance, the court not paying consideration to the fact that the note bore interest.²

The True Principle to be Deduced.

§ 32. Where these questions remain undetermined, the authorities are so much at war that it would be difficult to predict what rule would commend itself to the court. It seems to us that where the note was indorsed at the time of making, and whether it bore interest or not, it should be regarded as a continuing security, and would not be overdue in the hands of the payee either so as to open equities or as to discharge the indorser until payment was demanded and refused. But when transferred by indorsement, it would become, by the very act of indorsement, a draft by the indorser upon the maker; and the indorsee holding it should regard it, as it is in fact, a demand through him for the amount due the indorser. And it should, therefore, be presented immediately, subject only to such qualifications as apply to a bill payable at sight.

The following observations in "Byles on Bills,"³ on this subject, seem to us worthy of quotation. Says the author: "A common promissory note payable on demand, differs from a bill payable on demand, or a check, in this respect: the bill and check are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note payable on demand, is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed, it is not uncommon for the payee, and afterwards the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is therefore conceived, that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received, in order to charge the indorser; and when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the

¹ *Merritt vs. Todd*, 23 N. Y., (1861.)

² *Seaver vs. Lincoln*, 21 Pick., 267.

³ *Sharswood's ed.*, 338.

jury whether, under all the circumstances, the delay of presentment was or was not unreasonable."

Presentment for Payment when the Instrument was overdue at Time of Indorsement.

§ 33. When a negotiable instrument is indorsed after maturity, payment must be demanded of the payor within a reasonable time, and notice, in the event of a refusal, given to the indorser, in order to charge him—it being regarded as equivalent to one payable on demand.¹

The same circumstances and considerations which determine the question whether or not a bill or note payable on demand has become overdue so as to let in equitable defenses by the original parties against the transferee, alike determine the question whether or not the presentment has been in a reasonable time so as to charge the drawer or indorser.² Such at least is the doctrine in the United States according to the weight of authority, though there are cases which dissent from it. Some of them maintain that when the note is overdue at the time of transfer, the rule requiring presentment is to be less stringent than where it has some time to run.³ While by others a more stringent rule is applied;⁴ and it has been said, that "if the indorsement be made after the note falls due, the demand of payment must be made as if the note fell due the day of the indorsement."⁵

How Question of Reasonable Time Determined.

§ 34. Many of the authorities hold that the question of reasonable

¹ Tyler vs. Young, 6 Casey, 143; McKinney vs. Crawford, 8 Serg't & R., 351; Paterson vs. Todd, 18 Penn. State, 426, overruling Bank of N. A. vs. Barriere, 1 Yeates, 360; Leavitt vs. Putnam, 1 Sandf., 199; Berry vs. Robinson, 9 Johns., 121; Beebe vs. Brooks, 12 Cal., 308; Bishop vs. Dexter, 2 Conn., 419; Goodwin vs. Davenport, 47 Maine, 112; Dwight vs. Emerson, 2 N. H., 159; Levy vs. Drew, 14 Ark., 334; Jones vs. Middleton, 29 Iowa, 188; Benton vs. Gibson, 1 Hill, S. C., 56; Poole vs. Tolleson, 1 McCord, 199; Course vs. Shackelford, 2 Nott & McC., 283; Ecpert vs. Condres, 3 Const. R., 69; Union Bank vs. Ezell, 10 Hum., 335; Stothart vs. Parker, 1 Tenn., 260.

² Field vs. Nickerson, 13 Mass., 131; Berry vs. Robinson, 9 Johns., 121; Sice vs. Cunningham, 1 Cowen, 397; Bishop vs. Dexter, 2 Conn., 419; Course vs. Shackelford, 2 Nott & McC., 283; Kennon vs. McRea, 7 Port. Ala., 175. "A bill negotiated after day of payment, is like a bill payable at sight." Dehors vs. Harriott, 1 Shaw, 163; 1 Parsons N. & B., 375-6, 382; Bayley on Bills, ch. vii, sec. 1, p. 125.

³ Rugely vs. Davidson, 4 Const. R., (S. C.) 33; Hall vs. Smith, 1 Bay., (S. C.) 330; McKinney vs. Crawford, 8 S. & R., 351.

⁴ Nash vs. Harrington, 2 Aiken, 9; Aldis vs. Johnson, 1 Vt., 136.

⁵ Aldis vs. Johnson, 1 Vt., 136.

time is for the jury to determine as matter of fact;¹ while others maintain that it is matter of law for the court.² But neither is strictly correct. It is a mixed question of law and fact in most cases, to be determined upon hypothetical instructions of the court, like all other contested matters. And those authorities seem to us unassailable, which hold that when the facts are few and simple, or are presented upon a special verdict, or demurrer to evidence, it is within the province of the court to determine.³ When they are complicated and doubtful, and are not so presented, they must of course be left for the ascertainment and judgment of the jury, under instructions from the court.

SECTION IV.

PLACE OF PRESENTMENT.

At what Place Presentment should be made, when Bill or Note is payable generally.

§ 35. The presentment of the bill or note for payment should be made at the city, town, or other place in which the acceptor or maker has his home or domicile, or his place of business, provided there be no place designated in the instrument, or agreed upon by the parties as the place where it shall be paid at maturity.¹ If such place is designated or agreed upon, it will be sufficient to make presentment there.² And averment of presentment there is always sufficient, without any addition.³ If the maker or acceptor has both a dwelling house and a business house, in the same city, town, or other place, the presentment may be made at either.⁴ And if the maker or acceptor have a dwelling house or domicile in one city, and a place of

¹ Field *vs.* Nickerson, 13 Mass., 131; Hankey *vs.* Trotman, 1 W. Bl., 1; Goupy *vs.* Harden, 7 Taunt., 159; Straker *vs.* Graham, 4 M. & W., 721. In case of notes indorsed after maturity, it has been so held in Eccles *vs.* Ballard, 2 McCord, 388, Gray *vs.* Bell, 2 Rich., 67; and other decisions in South Carolina.

² Himmelman *vs.* Hotaling, 40 Cal., 111; Gray *vs.* Bell, 2 Rich., 67; Sylvester *vs.* Crapo, 15 Pick., 92; Sice *vs.* Cunningham, 1 Cowen, 408; Dennett *vs.* Wyman, 13 Vt., 485.

³ See Presentment for Acceptance in Southern Law Review for October, 1872; Darbshire *vs.* Parker, 6 East, 3; Tindal *vs.* Brown, 1 T. R., 167 (reasonable notice which stands on same footing); Mellish *vs.* Rawdon, 9 Berg., 416. Wyman *vs.* Adams, 12 Cush., 210; Taylor *vs.* Breden, 3 Johns., 136 (case of notice). Anderson *vs.* Royal Exchange Assurance Co., 7 East, 43; Ball *vs.* Wardell, Willes, 204.

⁴ Oakley *vs.* Beauvais, 11 Louis., 487; Mitchell *vs.* Baring, 10 Barn. & C., 11.

⁵ Brent's ex'r *vs.* Bank of Metropolis, 1 Peters; Eason *vs.* Isbell, 47 Ala., 456 (1868).

⁶ Hawkey *vs.* Borwick, 4 Bingham, 136 (13 E. C. L. R.).

⁷ Story on Bills, § 236.

business in another, it will, as it seems, be sufficient to present the instrument at either.¹

When the bill is presented for acceptance, the drawee may detain it for twenty-four hours, if he desire, before acting, to examine his accounts; but when a bill or note is presented for payment, it must be paid immediately; and the place of presentment for payment would, therefore, seem more important than the place of presentment for acceptance. Presentment for acceptance at the private dwelling of the drawee, is sufficient;² and the authorities support the doctrine that it is equally sufficient to make presentment there for payment.³

§ 36. Where, however, the maker or acceptor has a well-known house or place of business where he is accustomed to transact his financial affairs, and where demand may be made, it would be safer and more appropriate to present it there. Certainly it would seem unreasonable to expect, during the business hours of the day, to find any one at a private residence to answer respecting the payment of a negotiable instrument, when the maker or acceptor, if he have any place of business, would be presumably there; and during such business hours, due diligence would not appear to have been exerted in demanding payment at his house.⁴ If, however, business hours had closed, a presentment at the dwelling would seem sufficient. It is undoubted that a presentment and demand of payment at the place of business of the maker or acceptor is sufficient.⁵ Where it was contended that the demand should have been made at the maker's house, it was held otherwise.⁶

¹Story on Bills, §§ 236. 351; 1 Pars. N. & B., 422, note m.

²Chitty on Bills, (13th Am. ed.) 316.

³M'Gruder vs. Bank of Washington, 9 Wheat, 198, the court saying, "it is enough if the demand be made at his place of abode, or generally at the place where he ought to be found." Sanderson vs. Judge, 2 H. Bl., 509, it being said, "it is sufficient if it (demand) be made at the house of the maker of the note." Shamburgh vs. Comma-gere, 10 Mart. La., 18; Stivers vs. Prentice, 3 B. Monroe, 461.

⁴1 Parsons N. & B.; 423.

⁵Lanusea vs. Massicot. 3 Mart. La., 361.

⁶Sussex Bank vs. Baldwin, 2 Harrison, 487. In this case it was contended that demand should have been at the dwelling, but the Court said: "It appears by the evidence that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office, or known and settled place of business for the transaction of his monied concerns, whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, as well as a presentment and demand at his residence, is sufficient. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his monied concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or workshop would not. Yet, if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there."

The place of business must be the "usual place of business" of the party, and not that used for a mere temporary occupation,¹ though if it be really the place where he transacts his financial concerns, it matters not that it is a mere office, or desk-room in an office with others, and a demand there in his absence made during business hours will be sufficient.² If the party has closed his place of business at the time the bill or note matures, but has a place of residence in the city or other place where his business was conducted, which could be ascertained by reasonable inquiry, the presentment for payment should be made at his residence, and a presentment at the former place of business will not suffice.³ And, of course, where the party has no place of business other than the dwelling, the presentment must be at the dwelling.⁴ And so if a partnership place of business be closed when the note matures, and one of the partners resides in the town or city presentment at his residence must be made.⁵

When the presentment is made to the maker or acceptor personally, the place is not important, provided there is an express or implied refusal to pay. Presentment at the barn-yard has been held sufficient the party "making no objection, and intimating no readiness to pay;"⁶ and even in the street presentment would seem to be usually good unless objected to as improper, or some reason given for the refusal.⁷ But it would be more business like, and correct not to make demand at such a place, and it may be doubted if the party is bound to pay any attention to a demand so entirely outside of the custom of merchants.⁸

¹ *Sussex Bank vs. Baldwin*, 2 Harrison, 457.

² *West vs. Brown*, 6 Ohio State, 542; *Williams vs. Hoogewerff*, 25 Md., 128; *Bank of Commonwealth vs. Mudgett*, 44 N. Y., 514, (Case of Protest).

³ *Granite Bank, vs. Aqres*, 16 Pick., 392

⁴ *Packard vs. Lyon*, 5 Duer., 82. Maker was a married woman who kept a boarding-house, but her name was not on the directory. Demand at a bank when note was deposited, with inquiry as to place of residence was held insufficient, and indorser was discharged. ⁵ *Granite Bank vs. Aqres*, 16 Pick., 392.

⁶ *Baldwin vs. Farnsworth*, 1 Fairfax, 414. ⁷ *1 Parsons, N. & B.*, 421.

⁸ *King vs. Holmes*, 11 Penn. State, 456. Rogers, J., saying: "The Court correctly instructed the jury that a demand in the street of an acceptor of a bill of exchange is not a sufficient demand: that when a bill is payable generally, and not at a particular place, the demand must be at the place of business of the acceptor. But if the Notary on his way to the place of business of the acceptor, meets him on the street, and informs him of his business and where he is going, and the acceptor offers if he will go to his place of business to give him only a check on a broker, it is not necessary for the Notary to proceed further. The demand at the place of business is waived by the payor or acceptor. It is, in effect, a refusal to pay, for an offer to pay by a check on a banker, in legal contemplation, is nothing. It is not such a tender as the notary would be justified in accepting. In this case, the acceptor had no cause of complaint, for the Notary offered to receive a check on one of the banks in payment of the bill."

Place of Date prima facie Place of Payment.

The place of date in a note does not, of itself, make it payable there, and when a note is payable generally, the parties may agree upon the place where it shall be presented, and parol evidence is admissible to prove such an agreement.¹ It has been held that where the maker and indorsers have agreed where a note payable generally shall be presented for payment, presentment at such place is sufficient to charge the indorsers as well as the maker,² and the grounds upon which the decisions to this effect are based, are broad enough to establish the sufficiency of presentment at any place agreed upon by the maker. The contract of the indorsers is to pay if due diligence to obtain payment from the maker is used without effect. Due diligence requires presentment to the maker at his dwelling or place of business; and if the maker designates a place of payment, it is as much as to say, I will accept presentment at the place named, and make it my place of business so far as this transaction is concerned. Every object which would require presentment at the place of business is attained.³

¹ 1 Parsons, N. & B., 424. *Redfield and Bigelow's Leading Cases*, 326. *Contra*. *Story on Notes*, 49. *Pierce vs. Whitney*, 29 Me., 188.

² *Brent's Exr's vs. Bank of the Metropolis*, 1 Peters, 92. Marshall, C. J., saying: "The plaintiffs in error, contend that the testimony ought not to have been admitted because it was an attempt by parol proof to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the maker, and this does not alter the instrument so far as it goes, but supplies extrinsic circumstances which the parties are at liberty to supply. No demand is necessary to sustain a suit against the maker. His undertaking is unconditional, but the indorser undertakes conditionally to pay, if the maker does not, and this imposes on the holder the necessity of taking proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent." This case was based on evidence that the indorsers as well as the maker, had agreed that demand should be made at a particular place—the Bank of the Metropolis: *State Bank vs. Hurd*, 12 Mass., 171. *Meyer vs. Hilscher*, 47 N. Y., 265. *Thompson vs. Ketcham*, 4 Johns., 285. But see *Anderson vs. Drake*, 14 Johns., 114.

³ 1 Parsons, N. & B., 424. *Sussex Bank vs. Baldwin*, 2 Harrison, 487 on the ground of estoppel. This doctrine is doubted in *Red. vs. Big.*, *Lead. Cases*, 327.

Due Diligence in seeking Maker to make Presentment.

§ 40. Whether or not due diligence to find the maker of a note at the place where it is dated, will be sufficient, has been debated. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business; that it is sufficient, we should say, to charge an indorser, to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder did not know that his residence was elsewhere.¹ And if it were proved that the maker resided elsewhere, it would not devolve upon the holder the burden of showing that he made inquiries as to his residence.² This doctrine is sustained by high authority in America, and is that adopted in Scotland;³ and it seems to us correct, notwithstanding that there are cases in which a contrary view is taken, and it has been criticised by an eminent author.⁴ It is true that the exe-

¹In *Meyer v. Hilscher*, 47 N. Y., 270, it is said by the Court, *per Folger, J.*: "In such case (the note being dated at a place and payable generally) the note must be presented and payment asked for at the place of business therein of the maker if he has one; and if he has no place of business, then at his place of residence. And if he have neither place of business nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand." *Appersen v. Bynum*, 5 Coldwell, 348; *Staylor v. Williams*, 24 Md., 199; *Moodie v. Morrall*, 3 Const. R., 367; *Stewart v. Eden*, 2 Caines, 121.

²*Smith v. Philbrick*, 10 Gray, 252. *Merrick, J.*, said: "This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity, the holder placed it in the hands of a notary public, who, by his direction, went with it to the place of business which the maker formerly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action can not be maintained. The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then, and has ever since, resided at Port Lavaca, in the State of Texas, where he had his only place of business. At the trial no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston or elsewhere; there was no evidence whatever upon that question. * * * The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party may controvert this presumption and overcome it by proofs introduced. But no evidence to the contrary having been laid before the Court, this presumption is to stand." ³*Thomson on Bills* (Wilson's Ed.), 286.

⁴1 *Parsons, N. & B.*, 458. But see p. 453 of the same volume, in which the opinion concords with the text substantially, and varies from that subsequently given; also p. 442.

cution of a note and dating it at a particular place, does not make it payable there,¹ and this is the ground on which Professor Parsons bases the opinion that due diligence is not exercised in presenting it there without inquiry; but the question seems to us not one as to the contract of payment, but simply as to the likelihood of the maker's whereabouts. And in the absence of other information it seems reasonable to presume that he will be found at the place where he executes his business paper, and that if it had been intended that it should be payable elsewhere, it would be so expressed in its face.

And when the bill or note is made on terms payable in a city, without specification of a particular place, and the acceptor or maker has no residence or place of business there, it will be sufficient to charge the drawer or indorser if the holder have the bill or note in the city at maturity, ready to be presented and delivered up, if the maker or acceptor should appear.²

Presentment of Notes made, and of Bills drawn or accepted, payable at a particular Place in England.

§ 41. In England the steps necessary to fix the liability of parties to notes and bills made, drawn or accepted, payable at a particular place, were for a long time the subject of much disputation, the history of which it is no longer necessary to follow minutely in order to appreciate fully the settled condition of the law, or to understand its bearings upon the decisions in the United States. A case came finally before the House of Lords, in which the effect of an acceptance in the following language was discussed: "Accepted, payable at Sir John Perring & Co., bankers, London";³ and that body, overruling the views of eight of the twelve Judges whose opinion had been taken on the question, decided that the acceptance was conditional, restricting the place of payment, and that the holder was bound to present the bill at the bankers' named in order to charge the acceptor. If the holder brought an action against the acceptor, it was held necessary that he should aver and prove such presentment, otherwise the declaration would be bad upon demurrer. This decision led to the passage of the statute 1 & 2 Geo. IV., (generally called Sergeant Onslow's Act,) by which it was enacted that an acceptance payable at the house of a banker, or other place, without further expression, should be deemed a general acceptance, but if it

¹ Taylor *vs.* Snyder, 3 Denio, 145; Leghtner *vs.* Hill, 2 Watts & S., 140; Anderson *vs.* Drake, 14 Johns., 114; Fisher *vs.* Evans, 5 Benn., 541.

² Boot *vs.* Franklin, 3 Johns., 207.

³ Rowe *vs.* Young, 2 Brod. & Bing., 165; Bligh, 391, S. C.

were expressed payable at a bankers, or other place, "*only and not otherwise or elsewhere*," it should be a qualified acceptance, and the acceptor should not be liable except upon due demand at the place named.

This statute, it will be observed, did not apply to promissory notes;¹ and the liability of the drawer or indorser of a bill remained unchanged.² Where the place, therefore, is mentioned in the body of a note, presentment must, in England, be averred and proved,³ but if the place were mentioned in a memorandum beneath the maker's signature, it would be regarded as directory only.⁴ Where a bill is drawn with the expression of a particular place only, and not elsewhere, in the body, and accepted without further expression in the acceptance, it would be within the rule of the statute making it a qualified acceptance.⁵ And the words, "*and not elsewhere*," alone would be sufficient to incorporate the qualification.⁶

The same principles apply where the place of payment is specified in the body of the bill, and the acceptance is simply according to its tenor; and it will be necessary, in order to charge the drawer to present the bill at the particular place if one be named.⁷

Presentment at a particular place in the United States.

§ 42. The Supreme Court of the United States, and almost all the courts of last resort of the several States, have coincided with the views presented by a majority of the Judges in the case of *Rowe vs. Young* (quoted in a note to the foregoing paragraph), and differed from the decision of the House of Lords in that case; and in the United States it may be considered as settled, that where a note is made payable at a particular banker's or other place,⁸ or a bill is drawn or accepted, payable in like manner,⁹ it is not necessary, in re-

¹ *Emblen vs. Dartnell*, 12 M. & W., 830.

² *Gibb vs. Mather*, 8 Bing., 214.

³ *Sanderson vs. Bowes*, 14 East., 500.

⁴ *Sanderson vs. Judge*, 2 H. Bl., 509; 1 Pars. N. & B., 428; but see *post*, as to rule in U. S.

⁵ *Halstead vs. Skelton*, 5 Q. B., 86.

⁶ *Higgins vs. Nichols*, 7 Dowl., 551.

⁷ *Boydell vs. Harkness*, 3 C. B., 168 (54 E. C. L. R.); *Selby vs. Eden*, 3 Bing., 611; 11 J. B. Moore, 511; *Fayle vs. Bird*, 6 B. & C., 531; 2 Car. & P., 303; 9 Dow. & R., 639; see the decisions as to Promissory Notes; *Byles on Bills* (Sharewood's ed.), 342; 1 Pars. N. & B., 308, note Z.

⁸ *WaHace vs. McConnell*, 13 Peters, 136; *Armistead vs. Armistead*, 10 Leigh, 525; *Watkins vs. Crouch*, 5 Leigh, 522; *Ruggles vs. Patten*, 8 Mass., 480; *Caldwell vs. Gassady*, 8 Cowen, 271; *McNairy vs. Bell*, 1 Yerger, 502; *Thiel vs. Conrad*, 21 La. An., 214; *James vs. Manning*. Kent and Story inclined to the English rule: *Story on Notes*, §§ 227, 229; 3 Kent Com., 99; *Picquet vs. Curtis*, 1 Sumner, 478.

⁹ *Toden vs. Sharp*, 4 Johns., 183.

spect to the maker or acceptor, to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterwards, in order to maintain an action against him.¹ The only consequence of neglect of the holder to present, as said by President Tucker in *Armistead vs. Armistead*, 10 Leigh, 525,² is "that the maker, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs; but he must, at the same time, bring the money into court which the plaintiff will be entitled to receive. A further consequence, indeed, might follow, if any loss had been sustained by his failure to present; but this must be set up as matter of defense."³

Liability of Indorser and Drawer.

§ 43. In respect to the indorser of a bill or note, or the drawer of a bill, payable at a particular bank or other place, the rule is different. He is not the original debtor, but only a surety. His undertaking is not general, but conditional upon due diligence being used against the principal debtor, and such diligence requires presentment at the place specified, where it is to be presumed that funds have been provided to meet the bill or note at maturity.⁴

Where the instrument is payable "on demand," or "on demand after a certain time."

§ 44. A distinction has been taken by some of the courts in respect to bills and notes payable "*on demand*," or payable "*on demand after a specified time*;" and the opinion expressed that in such cases averment and proof of demand are necessary as well against the acceptor or maker as against the drawer or indorser. In Virginia, the court, while deciding according to the current of American authority in respect to a note payable at a fixed time, expressly restricted its application, and Stanard, J., said:⁵ "This decision does not embrace the case of a note or obligation payable in terms *on demand*, at a particu-

¹ Contrary decisions have been rendered in a few cases in the United States. In Indiana, *Palmer vs. Hughes*, 1 Blackford, 328; *Gilly vs. Springer*, *Id.*, 257; *Alden vs. Barbour*, 3 Ind., 414. The decisions in Louisiana, formerly of the same tenor, have been overruled, and the general doctrine now prevails there also.

² Reaffirming *Watkins vs. Crouch*, 5 Leigh, 522.

³ To same effect, see *Story on Bills*, § 356.

⁴ *Bank U. S. vs. Smith*, 11 Wheat., 171; *Watkins vs. Crouch*, 5 Leigh., 522; *Shaw vs. Reed*, 12 Pick., 132; *Nichols vs. Pool*, 2 Jones, N. C., 23; *Lawrence vs. Dobyns*, 30 Mo., 196; *Ferner vs. Williams*, 37 Barb., 9; *Chitty on Bills*, (13th Am. ed.) 409; *Story on Notes*, § 230.

⁵ *Armistead vs. Armistead*, 10 Leigh., 521.

lar place *after the lapse of a specified time*. In such cases it would probably be held, that there is no default of the maker or acceptor, until such demand be made, and consequently, that no action would accrue to the payee until such demand should be made."

In England, it was said by Lord Ellenborough, that in such cases "the time of payment depends entirely on the pleasure of the holder of the note,"¹ and that consideration seemed to him to render it impracticable for the maker or acceptor to set up the defense of readiness to pay. The Supreme Court of the United States has followed the same line of opinion, Thompson, J., saying:² "Where the promise is to pay *on demand* at a particular place, there is no cause of action until the demand is made, and the maker of the note can not discharge himself by an offer of payment, the note not being due until demanded."

§ 45. Striking as these views may seem, they do not appear to us to bear analysis as affording ground for departure from the general principle. A bill or note payable *on demand* is payable *immediately*—and if *on demand after a certain time*, immediately upon that time arriving. Although payable at a particular place, the payor may, if he apprehends loss by delay, or desires to discharge it, pay it anywhere. And the mere circumstance that it might be more difficult for the payor to show a loss resulting from a failure to present when his liability was continuing to be always ready, than when he is only required to shoulder the responsibility of being ready at a fixed time, does not seem to us sufficient to change the rule. He has the advantage of not being subjected to a protest until demand is made; he may pay at any time if he pleases; he may still show loss if any occurs. Suit brought is itself a demand; and as presentment at the particular place, although it be *expressed*, is no condition precedent as to him, we can not perceive how the words "*on demand*," which relate to time and not to place, can impliedly create a condition which even express words without the addition of "*not elsewhere*" do not create. The difficulty of the defense does not change the principle which requires it; and the cases which so determine seems to us to adopt the true philosophy of the subject.³

§ 46. In respect to bank notes, it has been held that when payable

¹ Sanderson *vs.* Bowes, 14 East, 500.

² Wallace *vs.* McConnell, 13 Peters, 136; Savage, C. J., to same effect in Caldwell *vs.* Cassidy, 8 Cowen, 271, but overruled by Haxtun *vs.* Bishop, 3 Wend., 1, same judge.

³ McKinney *vs.* Whipple, 21 Maine, 98; Gammon *vs.* Everett, 25 Maine, 66; New Hope D. B. *vs.* Perry, 11 Ill., 467; Cook *vs.* Martin, 5 Smedes & M., 379 (note payable on demand five months after date).

on demand—or on demand after a certain time—at a designated place, the demand must be averred and proved against the bank;¹ and they have been distinguished from individual notes by some of the cases.² But there are also express decisions the other way; and we can perceive no sufficient reason for the distinction.³ Loss, if any, may be shown by the bank as well as by the individual.

When payable at either of several places.

§ 47. If a bill of exchange be drawn payable at either of two places, and is accepted accordingly, as for example, if drawn payable at Maedstone or London, the holder has his choice to present it at either place for payment; and the like rule applies to a note made payable at either of two places. If the bill or note be not duly paid at the place where it is presented, the holder may protest it and give notice to the drawer and indorsers; who will be bound by its presentment and dishonor at the place of his election; although if presented at the other place it would have been duly paid; for in such cases all the parties agree to pay the bill or note upon due presentment at either place.⁴

Bills and Notes payable at either of several Banks.

§ 48. Sometimes a promissory note is made payable at any or either of the banks in a particular place, by some such expression as "payable at bank in Boston,"⁵ or "at either of the banks in Boston,"⁶ or "at any bank in Boston."⁷ In all such cases, the stipulation as to the place of payment is understood to be for the accommodation of the payee or holder, who is given the right to elect the bank at which the note should be presented, in order to charge the indorsers; and if upon presentment at any or either bank in the place named, payment is refused, the indorsers as well as the maker, are bound. The maker's promise is to pay the note at any of the banks in the place, and the duty is imposed upon him to look at all the banks for it, or provide funds to pay it at all of them when it is due.⁸

§ 49. A bill of exchange accepted, payable in like manner, stands upon the same footing as a promissory note, and the drawer and in-

¹ Bank of N. C. vs. Bank of Cape Fear, 13 Iredell, 75.

² Dougherty vs. Western Bank, 13 Ga., 87.

³ Montgomery vs. Elliott, 6 Ala., 701; Haxtun vs. Bishop, 3 Wendell, 1.

⁴ Beeching vs. Gower, 1 Holt., 318; Story on Bills, § 354; Story on Notes, § 231.

⁵ Malden Bank vs. Baldwin, 13 Gray, 154.

⁶ Page vs. Webster, 15 Maine, 249; Freeman's Bank vs. Ruckman, 16 Grat., 126.

⁷ Langley vs. Palmer, 30 Maine, 467.

⁸ Malden Bank vs. Baldwin, 13 Gray, 154, and cases cited above.

dorsers, as well as the acceptor, will be bound if it be presented at any or either of the banks in the place named.¹ This principle applies to large cities with many banks, as well as to small cities with few,² and the opinion once intimated that where there are several banks in a large city the holder must give notice to the promisor where the paper is,³ may be regarded as overruled.

It has been urged against this doctrine in every case which has adopted it, that the holder should give notice at what particular bank he elected to make the demand. But it has been well answered that "to require the holder to give such previous notice would not only defeat the object of relieving him from trouble and risk, but would subject him to much greater than if the bill or note were made payable at one bank only;"⁴ and that "if the parties wish for more certainty as to the place of payment, let them be more explicit in the bill."⁵

When Drawee or Acceptor reside in one Place, and Bill is payable in another.

§ 50. Where the drawee of a bill resides in one place, and it is drawn payable in another place, it would be sufficient to present the bill *for acceptance* to the drawee at the place where he resides, and if acceptance were refused, it might be there protested.⁶ And if the bill, not accepted, were presented to the drawee at his place of residence for payment, and payment refused, and there is no *particular* place designated in the bill for presentment, it would be sufficient, although the bill was payable in a certain city. Thus, where a bill was drawn in Liverpool and was payable in London, and was protested for non-acceptance, and also for non-payment in Liverpool, where the drawee resided, Kent, C. J., said:⁷ "A general refusal to pay was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in London. We do not mean to say that the demand for payment at Liverpool was indispensable. The bill being payable at London, it would have been sufficient for the holder to have been there when the bill fell due, ready to receive payment. In the present case, a protest at London, or a demand and protest at Liverpool, were sufficient, and the holder might take either course." So, if the bill, drawn upon the drawee in one place and

¹ Jackson *vs.* Packer, 13 Conn., 342.

² Langley *vs.* Palmer, 30 Maine, 467.

³ North Bank *vs.* Abbot, 13 Pick., 465; Shaw, C. J., expressed this opinion, but the question was not directly before the court.

⁴ Page *vs.* Webster, 15 Maine, 24, Shepley, J.

⁵ Jackson *vs.* Packer, 13 Conn., 342, Waite, J.

⁶ Mason *vs.* Franklin, 3 Johns., 202.

⁷ Mason *vs.* Franklin, 3 Johns., 202.

payable in another, be not accepted by the drawee, but is accepted *supra protest* for his honor by a third person, the presentment and demand should be made of the drawee at the place where he resides, and not at the place where it is made payable; because there has been no acceptance of the bill, and consequently the drawee has not authorized any presentment upon him, except at his place of residence.¹

§ 51. When the bill has been accepted by the drawee, and is drawn payable in another place, the case is different. There the acceptor only authorizes the presentment at the place designated, and the drawer or indorsers will be discharged if the bill be not there presented, or ready for presentment at maturity.²

SECTION V.

MODE OF PRESENTMENT FOR PAYMENT.

§ 52. Presentment of the bill or note, and demand of payment, should be made by an actual exhibition of the instrument itself;³ or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case.⁴ This is requisite in order that the drawee or acceptor may be able to judge (1) of the genuineness of the

¹ *Mitchell vs. Baring*, 10 Barn. & Cres., 6, 7. The decision on this case led to the passage of the act of 2 and 3 William IV., ch. 98, by which it was provided that "all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall, or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amounts owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted." Chitty on Bills, 13th Am. Ed., top p. 390, *349. This act seems practically to affect only acceptors *supra protest*.

² *Mitchell vs. Baring*, 10 B. & C., 7. Story on Bills, §§ 282, 353.

³ *Mussen vs. Lake*, 4 Howard, 262. In *Draper vs. Clemens*, 7 Misso., 52, demand was held insufficient because the bill was not produced. In *Freeman vs. Boynton*, 7 Mass.; 483, the demand was held insufficient because it appeared that the party demanding payment did not have the bill with him. To same effect see *Shaw vs. Reed*, 12 Pick., 132; *Arnold vs. Dresser*, 8 Allen, 435; *Posey vs. Decatur Bank*, 12 Alabama, 802, *Nailor vs. Bowie*, 3 Maryland, 251; *Smith vs. Gibbs*, 2 Smedes & M., 479.

⁴ *Etheridge vs. Ladd*, 44 Barbour, 69.

instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of it upon paying the amount. If, on presentment, the exhibition of the paper is not asked for, and the party to whom demand is made declines to pay on other grounds, a more formal presentment by actual exhibition of the paper will be considered as waived.¹ Where the note was in bank, a few rods from the maker's house, and the maker was informed by note from the cashier that it was there and requested payment, it was held sufficient;² and it was likewise held, where the statement in the protest was that the notary went, *with the draft*, to the bank and demanded payment.³ So, if the maker calls on the holder on the day of payment, at his place of business, declares his inability to pay it, and requests him to give notice to the indorser, it is sufficient to charge the indorser, as an exhibition of the paper would have been useless.⁴ Presentment and demand of payment can not be made by letter through the post office.⁵ It seems that delivery of written demand to a servant at the house of the promisor is insufficient.⁶

§ 53. A bill or note, when presented for payment, can not be left in the debtors hands as when presented for acceptance; and if it is so left, presentment can not be considered as made until payment is demanded. And if, in the meantime, the debtor has stopped payment, the holder would suffer to the extent of the difference between the value of the instrument at the time it was handed the debtor and the time payment was actually demanded.⁷ The earlier cases take a contrary view, and seem to us more reasonable, for the physical presentment of the paper, would seem to imply in itself a demand of payment.⁸

Mode of Presentment of Negotiable Paper payable at a Bank.

§ 54. When a bill or note is made payable at a bank, it is considered a sufficient presentment of it, if it is actually in the bank at maturity, ready to be delivered up to any party who may be entitled

¹ Lockwood *vs.* Crawford, 18 Conn., 361.

² Tredick *vs.* Wendell, 1 N. H., 80.

³ Bank of Vergennes *vs.* Cameron, 7 Bark., 143.

⁴ Gilbert *vs.* Dennis, 3 Met., 495.

⁵ Stuckert *vs.* Anderson, 3 Whart., 116; Gillespie *vs.* Hannahan, 4 McCord, 503; Hartford Bank *vs.* Green, 11 Iowa, 476; Barnes *vs.* Vaughan, 6 Rhode Island, 259.

⁶ Duke of Norfolk *vs.* Howard, 2 Shaw., 235. But quere in cases of sickness when the promisor is inaccessible on account of sickness. See 1 Parsons, N. & B., 371-2, note *y*.

⁷ Hayward *vs.* Bank of England, 1 Str., 550; Thomson on Bills, (Wilson's ed.), 304.

⁸ Turner *vs.* Mead, 1 Str., 416; Hoar *vs.* Da Costa, 2 Str., 910.

to it on payment of the amount due; and if at the close of business hours, the bill or note remains unpaid, it is considered as dishonored, and notice should be immediately given to the proper party. Such also is the case when the instrument is payable at a particular place.² Sometimes a formal presentment of the bill or note, in such cases, at the bank, or upon the maker is made; and the cases are uniform in holding that such a presentment at the bank is sufficient, even when the place is mentioned in the memorandum;⁴ but it is settled that nothing more than the presence of the paper there is necessary.⁵

But it was held in *Chicopee Bank vs. Philadelphia Bank*, 8 Wallace, 641, that though commercial paper be physically in the bank, which it is payable, yet if the bank is ignorant of this by reason of the fact that the letter in which it was sent slipped through a crack in the cashiers desk and disappeared before it had been seen by him, then there would be no presentment, though the acceptor had his funds there, and did not mean to pay the bill. And such a disappearance carried with it a presumption of negligence in the collecting bank, and threw upon it the burden of proof to rebut it; and in the absence of such proof the bank would be responsible to the holder for the amount of the bill or note.

When Paper is Property of Bank.

§ 55. If the paper is the property of the bank at which it is payable, its presence there at maturity need not be proved by the plaintiff.

¹ *Chicopee Bank vs. Philadelphia Bank*, 8 Wallace, 641; *Bank U. S. vs. Carnahan*, 1 Peters, 543; *Fullerton vs. Bank U. S.*, 1 Peters, 604; *Peoples Bank vs. Brooklyn*, 1 Md., 7; *Graham vs. Sangston*, 1 Md., 68; *Goodloe vs. Godley*, 13 Smedes M., 233; *Allen vs. Miles*, 4 Harr., Del., 234; *Woodin vs. Foster*, 16 Barb., 146; *Nichols vs. Goldsmith*, 7 Wend., 160; *Folger vs. Chase*, 18 Pick., 63; *Berkshire Bank vs. Jones*, 6 Mass., 524; *Apperson vs. Union Bank*, 4 Coldwell, 445; *State Bank vs. Napier*, 6 Humph., 270; *Reynolds vs. Chettle*, 2 Camp., 596; *Saunderson vs. Judge*, 2 H. Bl., 509.

² *Hunt vs. Maybee*, 3 Seld., 266.

³ *Ibid.* See, also, *Woodbridge vs. Brigham*, 13 Mass., 556; *Bank of Utica vs. State*, 18 Johns., 230; *Anderson vs. Drake*, 14 Johns., 114; *Bank of Syracuse vs. Hunter*, 17 N. Y., 46; *Gale vs. Kemper*, 10 La., 205; *Commercial Bank vs. Hamilton*, 17 N. Y., 46; *Jenks vs. Doylesburg*, 4 Watt and S., 505; *Rahm vs. Philadelphia Bank*, 1 Rawle, 335; *Cohea vs. Hunt*, 2 Smedes and M., 227; *Evans vs. St. John*, 1 Porter Ala., 186; *Apperson vs. Union Bank*, 4 Coldwell, 445.

⁴ *Saunderson vs. Judge*, 2 H. Bl., 509.

⁵ *State Bank vs. Napier*, 6 Humph., 270; *Gillett vs. Averill*, 5 Denio, 85; *Owens vs. Dobbin*, 2 Hall, 112; *Gilbert vs. Dennis*, 3 Met., 495; *Fullerton vs. Bank U. S.*, 1 Peters, 604.

tiff, as the presumption of law is that the paper was in the bank, and the burden rests on the defendant to show the contrary.¹ Even when it is not the property of the bank, it is not necessary to show that it was in the hands of the proper officer;² nor is this material, its presence *in the bank* being sufficient.³ Sometimes the accounts of the promisor are examined to see if there are funds to meet the paper payable at the bank;⁴ but this is unnecessary, any competent evidence being available to show that there were no funds there to meet it, and that no one offered payment.⁵ It is doubtful, at least, whether the mere fact that the bank had funds of the promisor in its possession would constitute any defense for the indorser, as the direction of the promisor is necessary to give the right to appropriate the money to the payment of the paper; but it is conceived that if the bank in such case has become the owner of the paper, it would constitute a defense to the indorser. Such is the opinion of Professor Parsons.⁶ Where a note was payable at the "Union Bank at Memphis," and there was no such bank there but a "Branch of the Union Bank," it was held sufficient to make presentment at such branch.⁷ If, upon repairing to the bank at which the paper is made payable during business hours, it is found closed, without any one there to answer, the protest may be made without demand or farther inquiry.⁸

Conventional Demand by Notice that Bill or Note is held in Bank.

§ 56. In some of the States it has become customary for a bank which is the holder of negotiable paper to issue a notice to the promisor, a few days before maturity, informing him that the paper is in bank, setting forth the date when it will become payable, and requesting him to come there and pay it. Such notice constitutes a conventional demand, and a neglect to comply with it is such a refusal as amounts to dishonor of the paper. The custom prevails where

¹ *Chicopee Bank vs. Philadelphia Bank*, 8 Wallace, 641; *Fullerton vs. Bank U. S.*, 1 Peters, 604; *Bank U. S. vs. Carneal*, 2 Peters, 543; *Seneca Co. Bank vs. Nease*, 5 Denio, 329; *State Bank vs. Napier*, 6 Humph., 270; *Folger vs. Chase*, 18 Pick., 63; *Berkshire Bank vs. Jones*, 6 Mass., 524.

² *Folger vs. Chase*, 18 Pick., 63.

³ *State Bank vs. Napier*, 6 Humph., 270, *infra*.

⁴ *Sanderson vs. Judge*, 2 H. Bl., 509; *Bank of S. C. vs. Flagg*, 1 Hill, S. C., 177; *Maurin vs. Perat*, 16 La., 276.

⁵ *State Bank vs. Napier*, 6 Humph., 270; *Gillett vs. Averill*, 5 Denio, 85.

⁶ 1 vol. N. & B., 437.

⁷ *Worley vs. Waldran*, 3 Sneed, 548.

⁸ *Thompson vs. Commercial Bank*, 3 Coldwell, 46; *Carter vs. Union Bank*, 7 Humph., 548.

the paper is payable at the bank giving the notice,¹ and as well when it is not made so payable, but is placed there for collection.² In Massachusetts this custom has become so general and universal that every one who incurs the liability of maker and indorser is presumed to have contracted in reference to it, and knowledge on his part is to be presumed.³ Before the law had there become so settled, it was held that proof of the party's being conversant with the usage was a requisite;⁴ but where, by the usage, demand was made in this form upon the maker, it was immaterial to the indorser to prove that he was acquainted with it—it being sufficient that he received due notice of dishonor.⁵ Evidence of the usage is sufficient in proof of the averment of presentment to the maker.⁶ In Maine the custom is sanctioned by judicial decisions,⁷ but it has been held with adverse expressions in New Hampshire;⁸ and in Maryland the evidence of its existence was regarded as insufficient, with a distinct intimation from the court that it would not be respected if proved.⁹

§ 57. In respect to the maker of a note or the acceptor of a bill, in terms payable at a particular place, this custom to inform him that his paper is there and that he is requested to meet it, amounts to nothing more than a reminder from creditor to debtor that it is his duty to comply with his agreement. When the bill or note, however,

¹ *Lincoln & Bank vs. Page*, 9 Mass., 155; *Same vs. Hammatt*, 9 Mass., 159.

² *Jones vs. Fales*, 4 Mass., 245; *Widgery vs. Munroe*, 6 Mass., 449; *Weld vs. Gorham*, 10 Mass., 366; *Whitwell vs. Johnson*, 17 Mass., 449.

³ *Grand Bank vs. Blanchard*, 23 Pick., 505; *Shaw, C. J.*, said, respecting this customary notice as constituting a demand, that "it has become so universal and continued so long, that it may well be doubted whether it ought not now to be treated as one of those customs of merchants of which the law will take notice, so that a man who is sufficiently a man of business to indorse a note, may be presumed to be acquainted with it, and assent to it, at least until the contrary is expressly shown." It is to be recollected that the rules respecting presentment, demand and dishonor of bills of exchange, and promissory notes, and indeed the *lex mercatoria* generally, are founded in the custom of merchants, which custom was a matter of fact to be proved by the party relying on it, and to be determined by the jury. But when a custom has been definitely settled by judicial decisions, it is taken notice of as a part of the law of the land, and need not be proved as a fact in each case."

⁴ *Weld vs. Gorham*, 10 Mass., 366; so held also in *Leavitt vs. Simes*, 3 N. H. Edwards on Bills, 509.

⁵ *Whitwell vs. Johnson*, 17 Mass., 449.

⁶ *North Bank vs. Abbot*, 13 Mass., 466; *Boston Bank vs. Hodges*, 9 Mass., 420; *Bank vs. Cutter*, 3 Pick., 414.

⁷ *Marine Bank vs. Smith*, 18 Maine, 99; *Gallagher vs. Roberts*, 2 Fairf., 489; *sons' N. & B.*, 370-371.

⁸ *Moore vs. Waitt*, 13 N. H., 415.

⁹ *Farmers' Bank vs. Duvall*, 7 Gill. & J., 78.

ever, is payable generally, the acceptor or maker can only discharge his contract by seeking the payee, or holder, at maturity, and paying the amount; and notification that his paper may be paid at a particular place, is information where his agent to receive payment may be conveniently found. But it is difficult to see how the holder can restrict the acceptor or maker to payment at that particular place except upon the ground that the bank itself is to be regarded as in law the holder, and it is the duty of the principal party to pay such holder at its only locality—its place of business.

§ 58. In respect to the drawer or indorser, the holder's contract, when the bill or note is payable generally, is, that he will present the instrument to the acceptor or maker. It is the holder's duty, in order to hold the drawer or indorser, to go to the acceptor or maker with the bill or note and demand payment; and it is stretching the principle which authorizes proof of custom in certain cases very far to permit the holder to reverse the established rule of law in respect to drawer or indorser, and notify the acceptor or maker to come to him, at a place designated by himself, to suit his own convenience.¹

The theory upon which the custom is regarded as controlling, is that the holder is bound to use due diligence to demand payment—that the maker or acceptor waives any further demand than at the place designated by the maker—and that the drawer or indorser consent to this customary waiver by entering into the contract where the custom exists. Its convenience, as a commercial usage—and the fact that the apprehension of dishonor in bank will probably operate as forcibly to constrain prompt payment by the maker or acceptor as a demand at his counting room or residence—have doubtless gone far to gain it countenance from the courts. And although were this question of original impression in the United States, we should consider that principle and authority would lead to a different conclusion, the courts of this country have gone so far to effectuate the customs of merchants, and give them a flexibility, suitable to the necessities and conveniences of commerce, that we believe it more in harmony with the spirit of our jurisprudence to sanction the controlling effect of this conventional demand than to deny it.²

§ 59. Knowledge by the indorser of the custom, has been regarded as essential to its establishment as against him in some cases.³ But

¹ Edwards on Bills, 510.

² See Observations of Shaw, C. J., in *Grank Bank vs. Blanchard*, *ante*.

³ *Leavitt vs. Simes*, 3 N. H., 14.

the United States Supreme Court say that parties are bound by an established usage of a bank, "whether they have a personal knowledge of it or not." and as the custom must be general in order to obtain recognition as such, we can not perceive that knowledge of it enters into the question any more than knowledge of any other rule of law. A custom is not a special personal contract, but a general and controlling rule.

JOHN W. DANIEL

Lynchburg, Virginia.

¹ *Mills vs. Bank*, 11 Wheat., 431.

THE REBELLION.

In this article I wish to glance at the late unpleasantness through legal spectacles. The topic will scarcely prove trite to the generality of the profession, and some of its features will be even novel to many whose practice has not taken them among the questions arising out of the war.

The moral right or wrong of the Southern movement is not involved in the merely legal view of the matter; and, accordingly, I shall not, expressly or impliedly, pass judgment upon that. Our revolutionary ancestors were right in cutting loose from Great Britain, with her selfish restrictive policy, regarding the Colonies as possessions to be managed in the interest of herself exclusively; but, in my judgment, the merely legal merits of the question upon which those ancestors placed their quarrel,—the right of the Imperial Parliament to tax the Colonies,—were clearly with Great Britain.

In the discussion of the subject under consideration the point of departure is, of course, that vexed question, the nature of the government of the United States under the Constitution. This question was the staple of what is well termed the Great Debate, in the Senate in 1833, in which Mr. Calhoun and Mr. Webster were the most conspicuous opposing champions of clashing theories. The two theories which have obtained may for convenience be termed the States' rights and the National.

According to Mr. Calhoun, the Constitution was a compact between the States. In adopting it, the States did not become in any respect blended into one mass. They merely established a common agency, to which they *delegated* the exercise of certain of the attributes of their sovereignty for the equal advantage of all. But the States did not *surrender* any of their sovereignty; nor did they transfer the *allegiance* of their citizens to the common government. Where the sovereignty exists, there must the allegiance abide also. The States severally imposed upon their respective citizens the duty of *obedience* to the new government. This duty rested upon the command of the State for its foundation. The constituent sovereigns knowing each no superior, must judge, each for itself in the last resort, whether the common agent confined its action within the

limits of the delegated powers. To allow it to judge ultimately the measure of its own powers, would be to elevate the mere agent above its principals. The Constitution was no more anything than a compact than was the Confederation. The Confederation, however, was adopted only by the State governments; the Constitution by the people of each State in their sovereign capacity. When it became a part of the Constitution of each State, being ratified by the same power that established the State Constitution. It thus restrained the action of the State legislature equally with the State Constitution. And then the government provided for by the Constitution was a very different arrangement from that established by the Confederation, since it operated, like the State governments, directly on individuals, and through its own instrumentalities, thus forming "a more perfect union." But it was, nevertheless, equally different from that of the Confederation, a mere agency, resting upon compact. The Constitution was adopted by the States; the Confederation by the State governments merely. But the States no more became blended into one composite State by adopting the Constitution, than the State governments became blended into one composite government by adopting the Confederation. Each sovereign State was bound to every other under the Constitution solely by plighted faith. Should any State, with or without adequate cause, annul the compact; whether this might involve a breach of good faith upon the part of the sovereign, its determination would, nevertheless, be binding upon its citizens; just as the unjustifiable repudiation by France of a treaty with the other nations of Europe would yet be binding upon all Frenchmen. The citizens of the State were bound to obey the common government because the people of the State in their sovereign capacity commanded such obedience; and if the same people in the same capacity commanded disobedience, the obligation was now as binding to disobey as it was previously to obey. To resist the common government at the command of the sovereign State could not be treason because treason is a violation of *allegiance*, and allegiance was due to the State, and only obedience to the common government, and that only through allegiance to the State, which commanded it. It would be treason to the State, however, to espouse the cause of the common government in opposition to the behest of the State sovereign. Resistance by the State to the common government could at most only be an unjust war waged by a sovereign. The sovereign of the State would shield the individual citizens from guilt. They must perforce obey their sovereign, to whom their allegiance was due.

whether right or wrong. In a word, the country—the object of patriotic attachment,—is the State. Whittier says of John Randolph, the most complete embodiment of States rights sentiment that has appeared among us:

“While others hailed in distant skies
Our eagle's dusky pinion;
He only saw the mountain bird
Stoop o'er his Old Dominion.”

This is the logic of the theory carried out legitimately.

According to this view of the nature of the government, the war was between State sovereignties. The unionists of the South were traitors to their States. And the result of the war was the conquest of the Southern States by the rest of the States, achieved through the agency of the general government; and the only restraint upon the conduct of the victors which the conquered could consistently urge, was to be found in the rules of international law governing such cases.

The other theory is, that the United States under the Constitution are a nation, the powers of the general government having been *surrendered* by the States. Among these powers is that to judge as to the extent of the powers surrendered. By the adoption of the Constitution the States became blended into one composite State, to the extent of the powers surrendered. The paramount allegiance of the citizen is due to the United States. The advocates of this theory, and emphatically Mr. Webster, have not, however, as it seems to me, rested it upon a satisfactory foundation. Mr. Webster appears to have thought that it was absolutely necessary to repel the idea that the Constitution was a compact, and to claim for it the basis of an adoption by the people of the United States collectively.

“What the Constitution says of itself, therefore,” said he, “is as conclusive as what it says on any other point. Does it call itself a compact? Certainly not. But it declares itself a CONSTITUTION. What is a *constitution*? Certainly not a league, compact, or confederacy; but a FUNDAMENTAL LAW.”

And again: “In the Constitution it is the *people* who speak, and **not** the States. The *people* ordain the Constitution, and therein address themselves to the States,” etc. “The Constitution utters its behests in the name and by authority of the *people*, and it does not exact from the States any pledged public faith to maintain it.”

This is substantially the language of Judge Story in *Martin vs.*

Hunter's lessee, 1 Wheaton, 324: "The government of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble to the Constitution declares, by the people of the United States." In *Chisholm v. Georgia*, 3 Dallas, 419, Chief Justice Jay used the following language: "Every State constitution is a compact made by and between the citizens of a State, to govern themselves in a certain manner, and the Constitution of the United States is likewise a compact made by the people of the United States, to govern themselves in a certain manner." The ratifications of several of the States contain similar language. That of Virginia declares: "that the powers granted under the Constitution being derived from *the people of the United States*, may be resumed by *them* whenever the same shall be perceived to their injury or oppression." In *McCulloch vs. Maryland*, 4 Wheaton, 403, Chief Justice Marshall affirms that from the conventions which ratified it, the Constitution derived its authority; but he afterwards adds: "The government proceeds directly from the people; is 'ordained and established' in the name of the people," etc. And again, on page 405: "The government of the United States then is emphatically and truly a government of the people. In form and substance, it *emanates from them*. Its powers are granted to it, *by them*, and are to be exercised directly on them, and for their benefit."

In President Jackson's Proclamation, Mr. Livingston employs the following more accurate language: "The people of the United States formed the Constitution, acting through the State legislatures in making the compact, to meet and discuss its provisions; and acting in separate conventions when they ratified those provisions. The terms used in its construction show it to be a government of the people, in which the people of all the States collectively are represented."

Judge McLean, impressed with the difficulty in the way of a theory of popular adoption, struck a sort of diagonal between that of State adoption, using in *Worcester vs. Georgia*, 6 Pet. 569, the following language: "The Constitution of the United States was formed, not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the States, but by a *combined power*, exercised by the people through their delegates, living in their sanctions to the respective States. Had the Constitution emanated from the people, and the States been referred to mere convenient districts by which the public expression could be obtained, the popular vote throughout the Union would have been the only rule for the adoption of the Constitution. This course was

pursued, and in this fact it clearly appears that our fundamental law was not formed *exclusively* by the popular suffrage of the people. The vote of the people was limited to the respective States in which they resided. So that it appears that there was an expression of *popular suffrage and State sanction* most happily united in the adoption of the Constitution of the Union." It certainly appears that Judge McLean's view of the matter is a rather mixed one.

The doctrine of a popular adoption cannot, I think, be maintained. Great Britain acknowledged the independence, not of one political entity called the United States, but of thirteen separate little nationalities. These were united under a mere league. Mr. Webster himself says that the Confederation "was a league, and nothing but a league, and rested on *nothing but plighted faith* for its performance." And again: "The old Confederation was expressly called a league, and into this league it was declared that the States, as States, severally entered." Clearly, then, anterior to the adoption of the Constitution, there was, in a legal sense, no such people as "the people of the United States." The Constitution when adopted, for the first time created direct relations between the people of the United States individually and a common government,—the only sense in which even now there is a "people of the United States." But the people of the United States cannot, as such, have adopted the instrument whose adoption constituted them a people.

Everybody knows that the Constitution was not submitted to a popular vote of the people of the United States in the aggregate, the majority of the aggregate to impose it upon the minority. It was submitted to the decision of the States separately. Each State ratified or rejected for itself alone. North Carolina and Rhode Island rejected it. No one questioned their perfect right to do so. The instrument itself provided for the contingency of an adoption by nine States, and that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution *between the States so ratifying the same.*"

The Constitution was then, beyond controversy, not adopted by the people, but by the States *as States*. The expression in the preamble, "we, the people, etc.," is not an argument to the contrary. This would refer anyhow to the state of things anterior to the ratification, and would show, if anything, what will not be contended, that there was *then* such a people as "the people of the United States." But the expression, "between the States so ratifying the same," entirely harmonizes with facts which no expression could

overcome. The expression in the preamble probably was intended by the framers to mean no more than that the people of each State in their primary capacity, ratified the Constitution, instead of the State governments, by which the Confederation was adopted. The result of the difference in the mode of ratification, according to the States' rights theory, was great. The action of the State government might detach the State from the arrangement entered into by the State government; but the Constitution, adopted by the people of the State, became a part of the constitution of the State and State legislation was restrained by its provisions as firmly as by any other prohibitions of the State Constitution; and it would require the action of the people in their sovereign capacity to abrogate what in that capacity they had ratified. Thus far greater stability was secured, and a "more perfect union" formed.

But not only does it seem to me clear that the Constitution was not adopted by "the people;" I cannot agree either that it is, in the scientific strictness of language, a fundamental law.

It calls itself the supreme law. But it calls the treaties entered into under it by the same name: yet treaties are not proper laws, but compacts. They require legislation to carry them out. Of course, the Constitution is *practically* a supreme law, since it overrides conflicting State and national legislation. But in scientific strictness the Constitution is not a law at all. A law derives its force from the pre-existing *authority* of the law-maker. It is imposed by this authority upon the unwilling as well as the willing. A law presupposes an existing community with authority to bind. It is the will of this community expressed in the mode prescribed for the purpose.

Obviously, the Constitution did not become obligatory in this manner. Each party to it adopted it for itself alone. The concurrence of nine States was to give it effect as the Constitution of the Union, leaving the four States which might reject it, to form such arrangements as they might think advisable. This instrument, thus becoming obligatory, by the mutual consent of the parties ratifying the same, upon these parties only, what can it have been but a compact to which the States were parties as States? It became obligatory upon each State upon the adverse minority in that State through the antecedent authority of the State over its citizens, upon the principle of self-law. But this was merely a consequence of its adoption by the States as a State.

Mr. Calhoun was entitled then to his position that the Constitution

tion was a compact between the States, to which they became parties as States.

But now arises the true point of contest between the two opposing theories, which is this: what sort of compact was the Constitution, and what was the result of its adoption? Mr. Calhoun stickles for the term, "*constitutional compact*." He repels the idea of a blending of the States into a composite State, and Mr. Webster contends for this idea. And Mr. Webster seems to have thought that if it were once conceded that the Constitution was a compact all would be lost. But might not a compact blend States, previously separate, into one? Might not the nations of Europe, if desired by all of them, consolidate themselves into one nationality, by adopting, each for itself, an instrument providing for this result? Yet this transaction would derive all its force from the principles of a compact, and would be merely the adoption of a compact. Every party would be free to adopt or reject.

Writers on Government refer its obligation ultimately to a *social compact* between previously independent individuals. But do they not all concede that when the compact has been executed the parties become blended into a community, their independence and their right of private judgment being surrendered up to the society formed by the compact; and that the powers conferred upon the government thus constituted can only be withdrawn by a revolution?

Now the only actual cases of social compacts have been where the parties were States. Political societies *have* been formed by the aggregation of previously independent communities, whilst there is no precedent of a community formed by the association of previously independent individuals. Any arrangement by which the contracting parties, whether individuals or States, form themselves into a body politic under a common government is a *social compact*. And the result of the adoption of a social compact is to blend into one entity, to the extent comprehended by the scope of the compact, the parties thereto. The assertion that the States after taking the plunge of ratification did not blend, is pure assumption. Those who resisted the adoption did so mainly upon the very ground that a consolidation would be the result. Patrick Henry asked, who had given the Convention the right to say, "We the people;" and in his last speech, he likened the relation of Virginia to the Union, under the Constitution, to the relation of Charlotte county to Virginia. The ratification of Virginia asserts that the powers conferred by the Constitution were derived from the people of the United States; so do the ratifica-

tions of other States. This evinces, at any rate, that it was then thought that the States were blended together. When it was urged against the Constitution before the State conventions, that the working of the government established by it would drift towards despotism, there would have been an unanswerable argument in favor of trying the experiment, that if it turned out as foreboded, any State might withdraw from the arrangement at pleasure, as she was to become bound only by plighted faith, as one sovereign to others—that there was to be no blending into a composite State. That no one advanced the notion, where it would have been so conclusive a reply to the earnestly plied objections, evinces that no one at the time entertained the notion.

There were two plans before the Federal Convention, called respectively the New Jersey plan, and the Virginia plan; the former on the principle of the States' rights theory, and the latter understood to embody the idea of a national government. The Convention resolved that a national government ought to be adopted. And, generally, at the time, the idea seems to have been entertained that the people of the United States, in their collective capacity, had adopted the Constitution; or, at least, that when adopted, it was meant to stand upon the same basis as if that had been the fact; and that the expression in the preamble, "We the people, etc.," was conclusive to this.

Had one single consolidated government been formed, and State individuality been entirely extinguished, as might have been done, there could then have been no controversy about the matter. Even then the Constitution effecting this would have been only a compact. But as the States were preserved for some purposes, plausible ground was given to the suggestion that they had not become blended together at all, but had only entered into a treaty with each other, establishing a confederate government. This hypothesis in the hands of a logician; it was found would consistently explain the functions of the new government; and it was eagerly adopted by those who were loth to give up the idea of State independence; and, among the rest, by many who had vehemently opposed the ratification of the Constitution upon the very ground that the government provided thereby was the sort of government which afterwards they denominated that it was.

By the adoption of the Constitution, then, the States became parties to a social compact, the result of which was to blend them into a composite State. They became thenceforth one as to foreign relations.

tions; as to commerce; as to the operation of the national laws. The coin; the flag; the army; the navy, became national. But the essence of the transformation consisted, in the last analysis, in this, that the SOVEREIGNTY was transferred from its former seat to a new one.

The word "sovereignty" is less understood than any other in the political vocabulary. Not one man in a hundred who uses it has any definite notion even of what he himself means by it. And the highest authorities unguardedly misuse it. Thus we often hear from courts and text writers, that sovereignty in this country is *divided* between the States and the United States. Sovereignty can not, in the very nature of things, *be* divided. It signifies the ultimate, absolute, illimitable power that exists *somewhere* in every independent society. In Great Britain, it resides in Parliament. When Louis XIV exclaimed: "*L'etat c'est moi*," he asserted that the sovereignty of France was concentrated in him. In Russia, I presume, sovereignty now abides in the Czar.

Before the adoption of the Constitution, sovereignty resided in each State. The State then knew no superior. Its will was limited only by its physical power. But the States are not *now* sovereign in any sense. They are now restrained by the Constitution of the United States, etc. Congress is not sovereign, for it has only powers affirmatively granted—expressly or impliedly. But the power which can amend the Constitution of the United States is *illimitable*. Here, then, we arrive at the sovereignty in our system. Here resides the WHOLE potentiality of the system, which may repartition the powers of the States and the composite State;—may redistribute the functions now divided between the local governments and the general government;—may contract or dilate the sphere of either, *ad libitum*; may reduce the central agency to a shadow, or erect it into an empire. The only *possible* security in the nature of things against the exercise in any given manner of this power, lies in the genius of our people. The State governments and the General government are the mere creatures of this Omnipotence,—mere tenants at will. Now the adoption of the Constitution of the United States was a surrender of the sovereignty by the States individually to the States united. This alone need be looked to, to show that the United States is not a confederacy, but a composite State.

It is an axiom of political science that where the sovereignty abides, there the allegiance is due. Also, that unless there is allegi-

ance, there can be no treason, in the strict sense of the term, which involves a breach of allegiance. Now the Constitution recognizes that treason may be committed against the United States. The Articles of Confederation did not undertake to provide for the impossible case of treason against the Confederation. I know that the State laws provide for a crime which they denominate treason; but it is not properly treason, though justly punishable by them. I know, also, that it is common to hear of a paramount allegiance due to the United States, and a subordinate allegiance due to the State. But there is no allegiance, in the strict sense, due to the State. Allegiance is due to the composite whole, in which the sovereignty resides, of which the States are members.

Professor Austin denominates the government of the United States a supreme federal government. I quote his language in relation to the nature of our system :

"The sovereignty of each of the united societies, and also of the larger society arising from the union of all, resides in the united Governments *as forming one aggregate body*—(the italics are his)—that is to say, as signifying their joint pleasure, or the joint pleasure of the majority of their number, agreeably to the modes or forms determined by their federal compact. * * * By that aggregate body, the powers of the general government were conferred and determined, and by that aggregate body its powers may be revoked or abridged. To that aggregate body, the several united governments, though not merely subordinate, are truly in a state of subjection."

The United States, then, is a composite State. The States and the Union are one complex whole. Judge Swayne has aptly said that the States are organisms for the local administration of their appropriate functions in the vital system of the larger polity.

It results that the Southern movement, right or wrong, was a rebellion; and those concerned in it are seen, through merely legal spectacles, to have been guilty of treason.

According to the States' rights conception of the matter, the Southern States became conquered provinces, bound to accept whatever laws the victors saw fit to impose upon them. The victors claim to have imposed the other theory of the government upon them; and, henceforth, the States' rights men are, upon their own principles, estopped to contest that theory. The States' rights theory is henceforth an exploded heresy for the nationalist; an abrogated system

for the States' rights man. The former regards the war as having judicially decided the theory always to have been wrong; the latter as having legislatively substituted for it the rival theory.

The XIIIth, XIVth, and XVth Amendments of the Constitution of the United States were dilations by the sovereign power, of the sphere of the General government; and correspondingly contractions of the spheres of the State governments.

The first abolished a domestic institution of States; the second regulated and secured the immunities of State and National citizenship, prohibited State discrimination between classes of citizens, changed the basis of State representation, enacted disqualifications for State offices, and restrained the States from the assumption of debts incurred in aid of the rebellion; and the third established universal suffrage within the States.

The interesting character of the question of the nature of our system of government has tempted me beyond the just limits of its relevancy to the general subject under consideration. One word more, however. We hear it almost universally said that in this country the *people* are sovereign. Legally and strictly considered, we find this to be untrue. It is *not* the people of the United States, collectively, who are sovereign. There is nothing which this people are competent to enact by a majority vote. The ultimate omnipotence of the system may be wielded by a small portion of the people. Take three-fourths of the States, beginning with the least populous, and so on, and suppose a proposed amendment to the Constitution of the United States, to be carried in each of these States, by a majority of one in each House of its Legislature, and that the other one-fourth of the most populous States are wholly unanimous against it; is it not plain, that in this case, a small minority of the people of the United States *might* radically transform the whole system, against the vehement dissent of a large majority? The three-fourths of the States, acting as States, and not the people of the United States, express with us the sovereign will.

* * * * *

Between the beginning of secession and active operations, some time intervened, during which, for various reasons,—*e. g.*, the confusion incident to a change of administration into new hands; the unprecedented character of the situation; the slowness with which the people of the North came to realize the determination of the Southern leaders; etc.,—the general government remained inert.

The Southern leaders chuckled over the bewildered condition of

Uncle Sam. They thought that the old gentleman was afflicted with incurable constitutional paralysis. Their own course in resisting whatever efforts he might make against them, was simple and plain. They would, upon their theory, be waging war against foreign invasion. But the government must act, if at all, upon *its* theory of the situation, according to which the acts of secession were nullities, the Southern States still in the Union, and their people entitled to the same constitutional immunities as the rest of the citizens of the United States. Burdened with constitutional shackles, how was the government to operate effectively against men whose hands were free? The government could not recognize their Confederate organization, nor could it even consistently regard as State action the hostile conduct of the seceded States beyond its own view of their legitimate spheres; and so the population of the South could not be affected through these organizations with the enemy character; and the war, on the part of the government, must confine itself to a personal war against the individuals in arms against it; while these would act with the advantage of the population and the organizations behind them.

This idea was corroborated by the Proclamation of President Lincoln, of April 15, 1861, declaring the laws of the United States to be obstructed in the seven seceded States, by combinations too powerful to be resisted by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law; commanding these combinations to disperse within twenty days; and calling for 75,000 militia to suppress them, and to cause the laws to be executed. This Proclamation was based upon the act of 1795, passed with a view to the suppression of the Whiskey Insurrection in Western Pennsylvania; and it seemed to evince that the line of action would be the same in character as if the insurgents were a handful of men in a small district, banded to resist the enforcement of a revenue law.

But the white heat of fury, enkindled by the firing on Sumpter, soon dispelled any such illusion as this. Proclamations followed, blockading the southern ports, and calling for vast armies. The Act of July, 1861, authorized the President to declare the inhabitants of States to be in insurrection, and prohibited commercial intercourse, except as licensed, with those so declared. Section 6, of the Act, declared any vessel belonging to any such inhabitant lawful prize if taken at sea. Other acts followed, providing for the raising and support of armies, and of naval forces;—pensions to soldiers and

ailors, etc., etc. — and the government was placed squarely upon the war path.

All these proceedings were regarded as violent and unconstitutional in the South, and there was a general feeling, even among the most zealous loyalists, that doubtless a great many unconstitutional things would have to be done in order to carry on the war efficiently. They were in favor of rolling up the Constitution for the time, and laying it upon the shelf, until it would do to regard its restrictions again. They became impatient when any body talked about the Constitution, and one subsequently very ardent constitutionalist, even went so far, in those days, as to brand constitutionalism as a mark of treason.

At length the Supreme Court came to pronounce upon the legal situation which thenceforth appeared in a new light to the eyes of most persons. This was at the December term, 1862, in what are known as the Prize Cases, reported in 2d Black, 635, &c.. Two of the vessels involved,—the *Amy Warwick* and the *Crenshaw*,—had been captured as lawful prize. They were the property of Virginians. The former vessel was captured near Hampton Roads, July 10, 1861. She was at the time, sailing under the Stars and Stripes, and her commander was ignorant of the war. The latter vessel was captured May 17, 1861—at the mouth of the James River. It will be noted that both of these captures were before the act of July 13, 1861, authorizing the President to declare the inhabitants of States to be in rebellion. The main question in the cases was whether there existed at the time of the captures a state of war,—legal war with its consequences,—between the United States and the population of the Southern States. The Court held that at the time of the capture a state of actual war did exist, that the Proclamation of the President was conclusive evidence of this, and that all persons residing within the territory occupied by the rebels were liable to be treated as enemies, though not as foreigners. The Court said:

“War has been well defined to be: ‘That state in which a nation prosecutes its right by force.’ The parties belligerent in a war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. A civil war is never solemnly declared; it becomes such by accident—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner, a certain

portion of territory; have declared their independence; have cast their allegiance; have organized armies; have commenced hostility against their former sovereign, the world acknowledges them belligerents, and the contest a *war*. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State; while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

" 'A civil war,' says Vattel, 'breaks the bands of society and government; or, at least, suspends their force and effect; it produces in the nation two independent parties who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, for the time, at least, two distinct societies. Having no common superior judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms. This being the case, it is very evident that the common laws of war, those maxims of humanity, moderation and honor,—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation.'

"As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know. The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, *civil war exists*, and hostility may be prosecuted on the same footing as if those opposing the government were foreign enemies to the land.' * * *

"It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection," by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged.

ged in order to constitute it a party belligerent in a war, according to the law of nations. Foreign nations acknowledge it as a war by declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Sancristima Trinidad*, (7 Wheaton 337), this Court say: 'the government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed its determination to remain neutral between the parties. Each party is therefore deemed as a belligerent nation, having, so far as concerns us, the sovereign rights of war.'

* * *
"We come now to the consideration of the second question. What is included in the term 'enemies' property?' Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as 'enemies property,' whether the owner be in arms against the Government or not? * * *

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law which say 'that persons who wage war against the King may be of two kinds, subject or citizens. The former are not properly enemies, but rebels and traitors, the latter are those that come properly under the name of enemies.'

* * *
"They insist, moreover, that the acts of the usurping government cannot legally sever the bond of *their* allegiance, they have therefore a correlative right to claim the protection of the Government for their persons and property, and to be treated as loyal citizens till legally convicted of having renounced their allegiance, and made war against the government by treasonably resisting its laws.

"They also contend that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law, &c.

"This argument rests on the assumption of two propositions, each of which is without foundation in the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, *he* can exercise *only* sovereign rights over the other party. The insurgent may be killed on the battle field, or by the executioner, his property on land may be confiscated under the municipal law, but the commerce on the ocean, which supplies the rebels

with means to support the war, cannot be made the subject of capture under the laws of war, because it is '*unconstitutional!!!*' Now is a proposition never doubted that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights. (See 4 Cranch 272.)

"Under the very peculiar Constitution of this Government, though the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

"Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new Confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territories of each of those States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are *none the less enemies because they are traitors.*"

From the moment, therefore, when the late unpleasantness became a civil war, the people in one section of our country became public enemies to those in the other;—all intercourse between them, commercial or other, became unlawful;—all contracts existing at the commencement of the war were suspended;—all made during its existence were void. The insurance of enemies' property; the drawing of bills of exchange on the enemies' country; the remission of bills of money to it, were illegal and void. Existing partnerships between citizens of the respective sections were dissolved. All the property of the citizens of the Southern States taken at sea, became liable to confiscation; also, with certain qualifications, (*Brown vs. United States*, 8 Cranch., 110,) all captured on land.

Chief Justice Taney, together with Justices Clifford and Catron, united with Mr. Justice Nelson in a dissenting opinion in these cases.

er dissent had reference, however, merely to the date of the existence of the war, legally considered. They held that legal war, with all its incidents, could not exist until recognized or declared by Congress, the war-making power in our system; and that the act of March 13, 1861, was the earliest recognition of the existence of the war by Congress. This act made the war territorial. The following act will sufficiently convey the substance of the dissenting view: In the breaking out of a rebellion against the established government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the government against those in rebellion, and at the same time extending encouragement and support to the loyal people, with a view to their co-operation in putting down the insurgents. This was the practice of England in Monmouth's rebellion in the reign of James II., and in the rebellions of 1715 and 1745 by the Pretender and his son, and in the beginning of the rebellion of the Thirteen Colonies in 1776. It is a personal war against the individuals engaged in resisting the authority of the government. This was the character of the war of our Revolution till the passage of the act of Parliament of 1776, 6th of George III., 1776. By that act all trade and commerce with the Thirteen Colonies were interdicted, and all ships and cargoes belonging to their inhabitants subjected to forfeiture, as if the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights and consequences known to the law of nations. Down to this period the war was personal against the rebels. * * * * Until the passage of the act of 1861 the American subjects were not regarded as enemies, in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize, of their property, as if the same were the property of open enemies.' For the first time the distinction was obliterated.

As to the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of the loyal citizens, with a view to their co-operation and aid in suppressing the insurgents, with this difference: as the war-making power was lodged to the King he might have recognized or declared the war from the beginning to be a civil war, which would draw after it all the consequences of a belligerent; but in the case of the President no such

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power existed: the war, therefore, from necessity, was a personal war until Congress assembled and acted upon this state of things." *

The opinion then refers to the act of July 13, 1861, and proceeds: "This act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The act of Parliament of 1776, which converted the rebellion of the Colonies into a civil, territorial war, resembles in its leading features the act to which we have referred. Government, in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection, usually modifies its efforts with a view, as far as practicable, to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence."

The minority opinion, with deference, seems to me the better one. Under the various acts of Congress the President's power would appear to be ample to make head against any exigency until Congress can be convened. During the brief interval military force can be vigorously applied without as with the territorial war status.

But the Court were unanimous as to the character of the war at the passage of the act of July 13, 1861. Subsequent cases involving the same view of the war, *e. g.*: *The Venus*, 2 Wal., 258; *Myers v. Alexander's cotton*, *Ib.*, 417; *The Circassian*, *Ib.*, 148; *The Baigou*, *Ib.*, 474; *The Andromeda*, *Ib.*, 488; *The Venice*, *Ib.*, 258; *The Juno*, 3 Wal., 83; *The Cornelius*, *Ib.*, 214; *The Cheshire*, *Ib.*, 214; *The Admiral*, *Ib.*, 603; *The Nassau*, 4 Wal., 634; *The Peterhoff*, 5 Wal., 28; *U. S. vs. Weed*, *Ib.*, 62; *The Gray Jacket*, *Ib.*, 342; *The Hampton*, *Ib.*, 372; *The William Bagaley*, *Ib.*, 377; *The Sea Lion*, *Ib.*, 630; *The Flying Scud*, 6 Wal., 263; *The Adela*, *Ib.*, 266; *Ouachita cotton*, *Ib.*, 521; *Coppell vs. Hall*, 7 Wal., 542, *McKee vs. U. S.*, 8 Wal., 163; *The Grapeshot*, 9 Wal., 129; *The U. S. vs. 200 bales of cotton*, 1 Woolworth, 236, Mr. Justice Miller; *Elgee's Adm.*, *Ib.*, 102; *Brown vs. Hiatt*, 1 Dillon, 372; *Philips vs. Holt*, *Ib.*, 573; *The Sarah Starr*, Bl. Pr. Cas., 69; *Hamilton vs. Dillingham*, Trigg, J., April term U. S. Circuit Court at Nashville, 1871; etc.,

This view of such a war as ours was not novel to our jurisprudence. In *Rose vs. Himely*, 4 Cranch., 241, it was applied to the conflict between France and her revolted colony, St. Domingo. And it springs obviously from the necessities of the case. For if a government might not exercise belligerent rights under the law of nations,

all as sovereign rights under its own municipal laws, against a
ted section, it would stand upon a worse footing in its military
tions than if the rebels were a separate nationality.

and yet, whilst familiar enough to public law, the theory of the
Cases, viz: that the mere magnitude of the rebellion gave it
a color of legality as to impose the enemy character upon loyal
residing among the rebels, was extremely novel; to them at

I question whether one in a hundred of these men can, even
quietly hear this proposition asserted.

Nevertheless, it was uniformly held and applied by the courts in
aspects;—e. g. in the *William Bagaley*, 5 Wal., 407, held that
effect of the war was to dissolve partnerships between parties in
rebel and parties in the loyal States; also, that the property of the
resident in the loyal State, allowed to remain in the rebel State,
confiscable as enemy property; in *Blackwell vs. Willard*, 65 N.
55, held that the payment of a debt to the attorney in North
Carolina of a New York client, during the war, was void, the rela-
tion of client and attorney being dissolved by the war; in *Peerce vs.*
Madon, 4 W. Va., 234, held that, during the war, the property
debts of the enemy may be confiscated, and that this power and
apply as well to the lawful government, State or National, in a
war to suppress a rebellion, as to independent sovereignties in
national wars; also, that during the war a citizen of a rebel State
no status in the courts of a loyal State; in *Woods vs. Wilder*,
10 N. Y., 164, held that copartnership between citizens of Georgia
and New York dissolved by the war. *Morris vs. Doniphan*, Ky.
Court of Appeals, 1863; U. S. Circuit Court for Mo., 3 Am. Law
Reg. (N. S.), 733, Treat, J., in *U. S. vs. 100 barrels, etc.*; U. S.
Circuit Court for Conn., in *Semmes vs. Insur. Co.*, 8 Am. Law Reg.,
3, 673; *Life Ins. Co. vs. Hall*, 7 do., 606; *Jackson vs. Ins. Co.*,
7 do., 673, all hold that right of citizens of rebellious States to sue in
courts in loyal States suspended by war; so in *Jackson Insur. Co.*
vs. Stewart, 6 Am. Law Reg. (N. S.), 732, approved by Redfield, J.
and disallowed on debt during the war, because debtor forbidden
to pay, in *Bigler vs. Waller*, U. S. Circuit Court for Va.,
1867, 111 Chicago Legal News, 26; also in *Tucker vs. Wat-*
son, 1 Am. Law Reg., February, 1867, and cases cited; and 1 Am.
Law Cases, 528, and authorities cited. In 32 Iowa, 302, deed by
Iowa to Ohioan, in 1863, held void. Contracts during the war
between parties within the federal and confederate lines, respectively,
Hennen vs. Gilman, 20 La. An., 241.

To same point, *Bank of Tennessee vs. Woodson*, 5 Cold., 176; *Graham vs. Merrill*, 5 Cold., 622.² Intercourse between residents of loyal and disloyal States respectively, illegal, *The Ouachita cotton*, Wal., 527; *McKee vs. The U. S.*, 8 Wal., 166; *The Crenshaw*, Pr. Cases, 2. 23; *The John Gilpin*, *Ib.*, 291; *United States vs. Wendenbury*, Rev. Cas., 66. And in *Miller vs. The U. S.*, 11 Wal., 2, held that the government had the right to confiscate the property of public enemies during the war wherever found,—this being an exercise of the war power, and not of the sovereign or municipal power. So that a Southern man might have been tarred and feathered by rebels for violent, persistent, outspoken loyalty to the United States, and yet that very man's property was, in theory, liable to confiscation by the United States, merely because, like poor Tray, he was found in bad company; though Tray had some choice in the matter, while the Southern loyalist had perforce to stay where his home and means of livelihood were.

I remember with amusement the dismay of Gen. Hickman, Huntsville, Alabama, when, just after his prosecution there for treason to the Confederacy, upon arriving at Nashville he found a quantity of his bacon *there* under sentence of confiscation to the United States. It may be jocosely added, however, that the General "saved his bacon" at both places.

The war then, while it lasted, wore to the legal no less than to the natural eye, the aspect of a contest between two independent sovereignties. The Southern States were, during this period, to quote the apt expression of Judge Trigg, in *Hamilton vs. Dillin*, already cited, "as it were, outside of the government."

In the case of *The Grapeshot*, 9 Wallace, 129, another incident of the war power was recognized. On October 20, 1862, the President, without any statutory authority, had issued a proclamation instituting a Provisional Court for the State of Louisiana, to hear, try and determine all cases in admiralty, etc. The case of *The Grapeshot* had been determined by this Court. The authority of the President to establish the Court was controverted in the Supreme Court. The Court said:

"That the late rebellion, when it assumed the character of a civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said at that point.

"The object of the National Government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization.

, and the re-establishment of legitimate authority. But in the attainment of these ends through military force, it became the duty of the Government, wherever the insurgent power was overthrown, to occupy the territory which had been dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National Government in this respect was no other than that which devolves upon the government of a regular belligerent occupying during war the territory of another belligerent. It was a military duty to be performed by the President as Commander-in-Chief, and intrusted as such with the direction of the military force by which the occupation was held. What that duty was when territory occupied by the national forces is foreign territory, has been declared by this Court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitenslager vs. Webb*, 20 How., 176, the authority of the officer holding provisional session for the United States to establish a provisional government, was sustained; and the reasons by which that judgment was supported apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker vs. Montgomery*, 12 How., 3, and *Cross vs. Harrison*, 16 How., 164, may also be cited in illustration of the principles incident to military occupation. We have no doubt that the Provisional Court of Louisiana was properly established by the President, in the exercise of his constitutional authority during the war."

In 13 How., 498, the Court say: "The courts established or sanctioned in Mexico during the war, by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms."

In 16 How., 164, shortly after the United States had acquired military possession of Upper California, the President, as Commander-in-Chief of the Army and Navy, authorized the commander of the military and naval forces to form a civil government for the conquered territory, and to impose duties on imports and tonnage for the support of the government and of the army of occupation. This action of the Provisional Government was sustained.

In 20 How., 176, the President had established a Provisional Government in New Mexico as conquered territory, which had or-

This case will be found to be a very interesting and instructive exposition of the philosophy of reconstruction, etc. The substance of the matter is that, while a seceding State was never, in theory, out of the Union, it yet did get badly out of practical relation to it; that the State governments in hostility to the Union were not rightful governments, being at most only *de facto* governments; that at the close of the war, there being no rightful governments in the seceding States, it devolved upon the United States, under the guaranty clause in the Constitution, to take the initiative to reconstruct the shattered fabric of republican government in these States, which duty belonged to the Legislative Department of the General Government.

But without now going into the details of reconstruction, let me repeat, that in the expansion of the war power of the United States growing out of the emergency of a gigantic rebellion, is to be found the warrant for acts of Congress and of the President, which at the time seemed to many to involve palpable violations of the plain letter of the Constitution. Some of these acts could not be justified upon the footing of the exercise of the ordinary municipal powers of government, *e. g.*, the Act of July 17, 1862, which provided that the property of persons in rebellion who did not return to their allegiance within sixty days after a proclamation to be made by the President, might be forfeited by a proceeding *in rem*, which Act appeared to conflict with the Fifth Amendment to the Constitution prohibiting the holding of any person to answer for a crime, "unless on a presentment or indictment of a grand jury;" since the Act seemed, under the guise of a proceeding by seizure *in rem*, to amount to punishing parties for rebellion by forfeiture of their property, without conviction on a presentment or indictment; also, the Act of August 6, 1861, which undertook to forfeit property used without the owner's consent, in aiding the rebellion, or acquired with the intention so to use the same. This latter act gave half the proceeds of the confiscation to the informer. In the Spring of 1862, one Thomas Wood of Pittsburg, Pa., came to Nashville, and insisted upon information under this act against a vast amount of property in Nashville, including the State Capitol, which he urged had been used without the consent of its owner—the State—in aid of the rebellion. John Triple, who then held the office of U. S. District Attorney at Nashville, quietly ignored all of Mr. Wood's informations, who thereupon shook the dust from off his feet, and withdrew his loyal soul from Nashville to other fields of operation. In the same category is to be placed

Abandoned Property Act of March 3, 1863, providing for the taking into the custody of the Treasury Department of all abandoned property in insurrectionary States.

It is needless to specify other acts. All of this class of acts are sustained by the decision of the Supreme Court in *Miller vs. the United States*, 11 Wallace, 268, already cited, which involved the Act of May 17, 1862, as exercises not of the sovereign rights of the Government under its municipal power, but of the war power. And the Government was fully sustained in such action by all the recognized authorities upon Public Law, in treating of the powers of the President in a civil war over his revolted subjects.

It is perhaps the fittest place for remarking that much confusion has existed in the minds of even able men in regard to how, after the war, had overthrown the theories upon which the rebellion was maintained, and had settled, by the ultimate decree of the God of Battles, from the beginning, the action of those involved in rebellion been illegal, the acts of the rebels during the period when their rebellion compelled the concession to them of belligerent rights, were to be regarded. The question is, are their acts done during the war, or the exercise of what are admitted to be belligerent rights, therefore to be held after the war, to have been justifiable in cases where the pendency of the war these acts would have been justified.

It must be borne in mind that after the war these acts must be judged from the point of view of the victor. I am now looking at them through merely legal spectacles. But these instruments are, of course, manufactured only by the opticians of the Government, in conformity with whose principles the rebel States are now organized. I am bound to say that,—with deference,—it is my clear conviction that our present Supreme Court have greatly misconceived the whole doctrine of the matter in question.

In *Smith vs. Brazelton*, 1 Heiskell, 44, they held that the cutting of the timber of the plaintiff below, which else would have been a trespass, was justified because done in the exercise of belligerent rights of the Confederates. In the reasoning of the Court, the *Cases 2 Black*, 667, are referred to as establishing that, the act of being a war, the Confederates might rightfully do every thing against the Government which it might do in suppressing the rebellion. The view of the Court may be sufficiently gathered from the following extract:

Were it an original question, we would, without hesitation, decide that a Government which assumed to form a Constitution, had

a President and Cabinet in actual authority, a Congress that enacted laws on most subjects of national legislation, and published them in due form, and enforced them; which was recognized as a belligerent power by two of the greatest nations on earth, was enabled to issue and keep afloat a currency, set on foot a navy that harassed the commerce of the United States throughout the world, marshaled immense armies, fought great battles, and kept the power of the United States at bay for four years,—was to all intents and purposes a *de facto* Government, &c.” Nelson, J.

In *Gunter vs. Patton*, 2 Heiskell, 261, the Circuit Judge,—Judge McClain—had charged below that it was the duty of a Confederate soldier to desert upon the first opportunity. Judge Nelson on page 261, declares this ruling “most startling.” Upon page 263, he says: “Viewed in the light of the Constitution and laws of the United States, and considering the Government of the Confederate States as a failure, there can be no question that while said government continued it was a usurpation.” Yet he goes on to argue that temporarily the power of the usurping government relieved the citizens from their allegiance to the lawful Government, and that “only temporary duties” arose to the usurping government. The doctrine of Confederate belligerent rights is responsible for the decision arrived at, though the terrible penalties of desertion are dwelt upon, etc. But Judge McClain had not required the soldier to desert unless he had a good chance, and had guarded the point of duress sufficiently.

But during the December term, 1872, of the Court at Nashville the most extreme views were expressed by the Court upon this subject by Judge Turney, in the case of the *Bank of Tennessee vs. Cummings, Admr.* The case was a suit on a note discounted to obtain money to use in the manufacture of gun powder for the rebellion, where the officer taking the note knew to what purpose the money was to be applied, and advanced the money with the intent to aid the rebellion. The note was held collectable. The reasoning of the Court went the full length of holding every act valid in furtherance of the belligerent rights of the rebels which would have been valid if done in furtherance of similar rights of the lawful government. And this although the Court is now sitting as a part of the lawful Government.

The reasoning of the Court in *Smith vs. Brazelton* and the just cited would unquestionably sustain a title derived through a confiscation decree of a Confederate Court. No logical mind could

ly evade this conclusion after adopting the views announced by Court. The confiscation in *Miller vs. the United States*, 11 268, was held to be in the exercise of the belligerent rights of United States Government. The equal belligerent rights of the Confederate Government should have rendered equally valid a similar Confederate confiscation. The sentence of a U. S. Prize Court of the titles of the owners of the *Amy Warwick* and the *Law*, upon the ground that they were during the war public enemies of the United States, because residents of Virginia. Similarly, in the view of our Supreme Court, the sentence of a Confederate Court might now be set up as a valid title to a vessel captured during the war as the enemy property of a resident of New York.

The precise point decided by Judge Turney, in the *Bank of Tennessee vs. Cummings, Admr.*, was oppositely decided by the Supreme Court of the United States in *Hanauer vs. Doane*, 12 Wallace, 342. That case was a suit to collect promissory notes, a portion of the consideration of which was supplies furnished a Confederate contractor. It is stated in the opinion of the Court on page 346, &c. "With reference to that portion of the consideration of the notes which consisted of supplies sold by Hunter and Oakes to Hanauer for the Confederate Army, the Judge instructed the jury that bare knowledge on the part of Hunter and Oakes that Hanauer intended or expected to turn the goods over to the rebel army would not make the sale illegal or void; but that, to make it so, it must appear that Hunter and Oakes had some concern in furnishing the supplies to the rebel army, or intended to aid therein. In this instruction we think the Judge erred." So would Judge Turney hold that he erred, but in the opposite direction. The United States Supreme Court proceeded: "Whichever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *in m prohibitum*, or of inferior criminality, he cannot do it without fault or faultitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the opinion of Chief Justice Eyre, in *Lightfoot vs. Tennant*, (1 Bos. & Pul., 200, &c.) 'the man who sells arsenic to one who he knows intends to use it on his wife with it, will not be allowed to maintain an action on his contract. * * * No man ought to furnish another with the means of transgressing the law, knowing that he intends to make use of them.' * * * No crime is

greater than treason, etc." Judge Turney's case was where the advancing the money confessedly intended thereby to aid the rebellion.

But the point directly in view is the figure which the belligerent rights of the rebels *now* cut in cases where they are relied on for justification. The reasoning of our present Supreme Court has been stated, gone to the length that any act which the belligerent rights of the United States during the war would now make valid as a defense; if done upon the other side of the contest, would now be equally valid, for the same purpose. As I have said, this would clearly sustain a Confederate confiscation of enemies' property during the war. It is precisely in this case that I find an opinion of Chief Justice Chase delivered at the circuit in North Carolina, in 1862, which contains a clear exposition of the proper view of the law on this regard. The decree of a Confederate Court sequestering a property as due to an alien enemy was relied on in bar of an action to cover the debt. I quote the opinion:

"Upon these facts (after stating them) it is insisted that the defendant is discharged from his liabilities to the plaintiffs. It is claimed that, while it existed, the Confederate Government was the *de facto* government; that the citizens of the States who did not recognize its authority were aliens, and in time of war alien enemies; consequently, the acts of sequestration were valid acts, and therefore that payment to a Confederate agent of debts due to such citizens was compelled by proceedings under those acts, relieved the debtors of all obligations to the original creditors.

"To maintain these propositions the counsel for the defendant rely on the decision of the Supreme Court of the United States, to the effect that the late rebellion was a civil war, in the prosecution of which belligerent rights were exercised by the National Government, and accorded to the armed forces of the rebel Confederacy, and on the decisions of the State courts during and after the close of the American war for independence, which affirmed the validity of confiscations and sequestrations decreed against the property of resident British subjects, and the inhabitants of Colonies or States hostile to the United Colonies or United States.

"But these decisions do not, in our judgment, sustain the propositions in support of which they are cited. The National Constitution declares that treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. It has been supposed by some, and strenuously

maintained, that the North Carolina ordinance of 1861, which attempted to repeal the North Carolina ordinance of 1789, by which the Constitution of the United States was ratified, and to repeal also the subsequent acts by which the assent of North Carolina was given to amendments to the Constitution, did in fact repeal that ordinance and those acts; and thereby absolved the people of the State from all obligations as citizens of the United States, and made it impossible to commit treason by levying war against the National Government.

No elaborate discussion of the theoretical question thus presented now seems to be necessary. That question, as a practical one, is now settled, and is not likely to be revived. It is enough to say here, in our judgment, the answer which it has received from events, and which the soundest construction of the Constitution warrants as requiring.

Can we agree with some persons, distinguished by abilities and talents, who insist that when rebellion attains the proportions and assumes the character of civil war, it is *purged of its treasonable character*, and can only be punished by the defeat of its armies, the disappointment of its hopes, and the calamities incident to unsuccessful war.

Courts have no policy; they can only declare the law.

On what sound principles then, can we say, judicially, that the levying of war ceases to be treasonable when the war becomes formidable? That, though war levied by ten men or ten hundred men is certainly treason, it is no longer such when levied by ten thousand or a hundred thousand?

That the armed attempts of a few, attended with no serious danger to the Union, and suppressed by slight exertions of the public arm, come unquestionably within the constitutional definition; but attempts by a vast combination, controlling several States, putting vast armies into the field, menacing with imminent danger the very life of the Republic, and demanding immense efforts and immense expenditure of treasure and blood for their defeat and suppression, swell beyond the boundaries of the definition and become *innocent in proportion to their enormity*.

In modern times, it is the usual practice of civilized governments checked by organized and formidable rebellion, to exercise and concede belligerent rights. Instead of punishing rebels when made prisoners of war, as criminals, they agree on cartels for exchange, and make other mutually beneficial arrangements; and instead of insist-

ing upon offensive terms and designations in intercourse with civil or military chiefs, treat them, as far as possible without surrender of essential principles, like foreign foes engaged in regular warfare.

"But these concessions are made by the legislative and executive departments of government, in the exercise of political discretion and in the interests of humanity, to mitigate vindictive passions kindled by civil conflict, and prevent the frightful evils of mutual reprisals and retaliation. THEY ESTABLISH NO RIGHTS EXCEPT DURING THE WAR.

"It is true that when the war ceases, and the authority of the regular government is fully re-established, the penalties of violated principles are seldom inflicted upon the many.

"These principles, common to all civilized nations, are those which have regulated the action of the Government of the United States during the war of the Rebellion, and have regulated its action since the Rebellion laid down its arms. * * * * *

"On no occasion, however, and by no act, have the United States ever renounced their constitutional jurisdiction over the whole territory, or over all the citizens of the Republic, or conceded to citizens in arms against their country, the character of alien enemies, or to their pretended government the character of a *de facto* government.

"In the Prize Cases, the Supreme Court simply asserted the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties under the penalties known to international law. The decisions recognize also the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that during the war all the inhabitants of the country controlled by the rebellion, and all of the inhabitants loyal to the Union, were enemies, reciprocally, each of the other.

"But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it, that the insurgent States, by the act of rebellion and of levying war against the nation, became foreign States, and their inhabitants alien enemies.

"This proposition being denied, it must result that in compelling debtors to pay receivers for the support of the rebellion debts due to any citizen of the United States, the insurgent authorities commit no illegal violence, by which no obligation of debtors to creditors could be cancelled or in any way affected.

those who engage in rebellion must expect the consequences. If succeed, rebellion becomes revolution, and the new government will be the government of its founders. If they fail, all their acts hostile to the rightful government are violative of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.

We hold, therefore, that the compulsory payment under the sequestration acts to the rebel receiver, of the debt due to the plaintiff's defendant, was no discharge."

This case will be found cited at length in what are known as *The Sequestration Cases*, 30 Texas, 700, in which the same points of law were set up and similarly decided. The Texas Court say:

"Every act of the State of Texas, from the inception to the close of the rebellion, in hostility to the United States, or in disregard of the Constitution, or in aid of the rebellion, is an absolute nullity. * * * There was not a moment of time during the existence of the war when the Constitution of the United States did not assert its authority over the States in rebellion; and although the exercise of this authority was for a very considerable time obstructed and prevented by the rebellion in Texas, as elsewhere, yet when that force was broken down by the Union—when the final judgment of the great arbitrament of arms was pronounced,—condemnation of every act, whether Confederate or State, done or attempted in contravention of the Constitution of the United States, was its necessary and legal effect; for the issues were decided and included all, and the judgment was final upon all the issues." Here was held that the State governments in the South during the war were not *de jure*, but were *de facto* governments; for the States did actually and legally exist; but the Confederate government was not even a *de facto* government, for it was rebellion itself. There must be a legal office before there can be even a *de facto* office. The States and their offices,—legislative, executive and judicial,—the offices themselves,—did legally exist; only the incumbents were wrongfully in the occupancy of them. This made the officers, not *de facto* officers. But the Confederate government could have no legal existence. The matter seems to be plain. During the war the rebels regarded themselves as patriots, and if they had succeeded they would have established this character; but the Government, while it was compelled by their power for a time to concede to them all the courtesies and amenities of modern warfare, always regarded them as traitors; and, as it *did* succeed, it established this character of them, which must, by relation, characterize all their acts

from the beginning to the end of the contest. Now the Government had a legal right to suppress the rebellion; and hence all *its* belligerent acts done for this purpose *remain* valid: but the rebels had no right according to the view of the Government,—which is now the law,—right to resist the Government, and so *their* belligerent acts were simply treason.

Suppose Paul Jones and his crew had been caught during our revolutionary war, and great Britain had afterwards succeeded: imagine them defending themselves before Lord Mansfield, in Westminster Hall, upon the plea of the belligerent rights during the war conceded to the rebels! One can hardly think of it without a smile.

The Court of Appeals of Kentucky have held the same doctrine as to belligerent rights as our Supreme Court, in 1 Bush, 327, 404.

In *Knox vs. Lee*, 12 Wallace, 457, counsel had the hardihood to argue before the Supreme Court of the United States the validity of a Confederate confiscation title, citing *Mauran vs. Insurance Co.* 1 Wal., 1, as applicable. The syllabus of this case is the following: "A taking of a vessel by the naval forces of a now extinct rebel confederation whose authority was unlawful, etc., etc., and which confederation had never been recognized as one of the family of nations, is 'a capture,' within the meaning of a warranty on a policy of insurance having a marginal warranty 'free from loss or expense by capture,' if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as having in fact the ruling or supreme power of the country over which its pretended jurisdiction extended. Accordingly, a seizure by a vessel of the late so-called Confederate States of America, for their benefit, was a capture within the terms of such a warranty." A very peculiar view of a very different matter.

In this case, however, on page 13, the Court say: "We all agree that the proceedings of these eleven States, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void; and that they remained after the attempted secession and change of government, in judgment of law, as completely under all their constitutional obligations as before."

The Supreme Court, of course, held that the Confederate constitution was a nullity, not condescending to argue such a point, but merely referring to *Texas vs. White*, 7 Wallace, 700, as having settled the point.

In this case, it was held that the property of the State, alienated during the rebellion, by the usurping State Government, for the purpose of carrying on the war against the United States, might be reclaimed by the restored State Government, organized in allegiance to the Union. Also, that all the acts of the State governments (being *de facto* governments) in furtherance of the rebellion, or intended to defeat the just rights of citizens was void. *A fortiori*, any act of the Confederate Government (which was never a *de facto* government,) through any of its departments, was void; for the Confederate Government was merely rebellion itself organized

The decisions of our former Supreme Court in *Davidson vs. Manlove*, 2 Cold., 346;—*Wood vs. Stone*, J. B., 370,—*Yost vs. Stout*, 4 Cold., 206; *Hamilton vs. Nowlin*, 5 Cold., 83, &c., were consonant with the views of the United States Supreme Court upon the subject immediately under consideration.

To the same effect are the following decisions: *Smith vs. Stewart*, 21 La., An., 67, where it was held that the Confederacy was not a *de facto* government, and that its authority was no protection against liability for a trespass; *Echols vs. Stauntons*, 3 W. Va., 574, same point decided; *Tatum vs. Kelly*, 25 Ark., 209, note held void given in payment for guns to arm rebel soldiers; *Smith vs. Graves*, 25 Ark., 458, party held liable for horse taken by him on duty as Confederate soldier; *Leek vs. Commissioners of Richmond Co.*, 64 N. C., 132, note given in aid of rebellion, void;—see also, *Setzer vs. County Commissioners*, *ib.*, 516; *Critcher vs. Holloway*, *ib.*, 526; and *Kingsbury vs. Gooch*, *ib.*, 528. *Thomas vs. Taylor*, 42 Miss., 651,—even rebel State government neither *de jure* nor *de facto*. 4 W. Va., 138, Confederate authority no defense to action of false imprisonment; 37 Ga., 515, no title acquired at Confederate confiscation sale; 37 Ga., 532, note for services as substitute in Confederate army, void; 20 La., An., 158, price of horse sold with knowledge that he was to be used in rebel service, not collectable now; 52 Barb., 604, Confederate confiscation title void.

A *de facto* government would exist where rebellion had obtained the control of the offices of the lawful government.

The County Commissions substituted by our Legislature some years ago for the County Courts in many of the counties of the State, and which obtained possession of the county records, and acted as the county organizations until overthrown by the change of power consequent upon the repeal of the Franchise Act, were never *de facto* county governments, not consisting of officers irregularly oc-

cupying legally created offices;—the offices themselves, as decided the Supreme Court, in *Pope vs. Justices of White County*, 3 Heisk. 682, upon the doctrine of implied constitutional restriction, pressed in 15 N. Y., 537, and applied as by our Supreme Court, in *People vs. Hurlbut*, by the Supreme Court of Michigan, in 18 (see also, *Caldwell vs. Justices*, 4 Jones, N. C., Equity, 323,) to have had no legal existence.

Such was necessarily the nature of the Confederate Government. It was not a *de facto* government, but merely what the United States Supreme Court denominate it, in 8 Wallace, 9: "*a Government paramount force, * * * the military representative of the insurrection against the authority of the United States.*"

Our Supreme Court actually seem to view the Confederacy as *short lived legal nationality*. In *Conley, Admr., vs. Burson, &c.* Heisk., 149, they say: "The tenor and meaning of the decisions of this Court since its reorganization, are that the States of the Union at war with each other, were in that war *as separate and distinct nations.*" Such has indeed been their tenor and meaning. The Court seem not to realize that they are a court of the United States, and are bound to regard the war and its consequences from the point of view of the National Government, with which they are now in proper relation; from which point of view, the rebellion must be looked at and treated *now* as a treasonable attempt to divide the Nation, and this view upon its final triumph relating back and characterizing every transaction from first to last. They wholly misconceive the nature and extent of the concession of belligerent rights to the rebels during the days when their power compelled this concession. This is the criticism unsparingly passed upon them, by ex-Confederates who accept fairly the situation, no less than by former Unionists; though perhaps it seldom reaches their ears.

The rebel State governments, however, were *de facto* governments. In the *Sequestration Cases*, 30 Texas, 700, already cited, the Court say: * * * "It was neither usurpation of the rights and authority of the United States as they existed before the war, nor in contravention of any expressed policy during its existence, for the insurgent States to perform such acts of local legislation as were permitted to the States by the Constitution of the United States. * The public law of nations does not deny to a people engaged in rebellion and civil war, however wrongful, against the rightful sovereignty, civil organization and administration. * * * s repugnant to every principle of reason and sound policy, and

the modern usage and public law of nations, to hold that all laws, without political significance, enacted in this or any other of the Confederate States, are to fall at a single blow, and with them all the innumerable rights which have grown up and been fairly acquired under them."

The Court call attention to the fact, that while the acts of Congress of March 2, 1867, and July 19, 1867, declare the then existing governments in said States not "legal," *i. e., de jure* governments, they were yet permitted to continue in existence until rightful governments could, under the auspices of the Union, be ordained and established.

Section 5, Schedule,—Amendment 1865, Constitution of Tennessee, purporting to be declaratory, and not enactive, pronounces void "*all* laws, ordinances and resolutions, as well as all acts done in pursuance thereof, under the authority of the usurped State Government," after May 6, 1861.

If these were *all* void, irrespective of their character, it must have been on account of the attitude of the State toward the National Government after May 6, 1861, a reason which would equally invalidate the action after then of the other departments of the Government, including the Judiciary. The latter part of the section provided that it should "not be construed so as to *affect* any judicial decisions made by the State courts held at times differing from those provided by law prior to May 6, 1861;—said judicial decisions being made pursuant to the laws of the State of Tennessee enacted previous to said date, and between parties present in court and litigating their rights." The proviso is that the section "shall not be construed to *affect &c.*"—Then it neither validates nor invalidates. It merely refrains from invalidating. Other classes of judicial decisions than those mentioned are not, of course, affected. So that the section leaves all judicial decisions simply untouched.

In *Parks vs. Jones*, 2d Cold., 172, a decision made after May 6, 1861, not in the category mentioned in the Schedule was held valid. The Court held that the section in question validated, or recognized as valid, the class of decisions embraced, and argue that if *those* were valid, a *fortiori* must be such as the one involved in the case before them.

In *White vs. Cannon*, 6 Wallace, 443, the United States Supreme Court decided that the secession ordinance of Louisiana being a nullity, did not affect the jurisdiction of the Supreme Court of the State, or its relation to the appellate power of the Union.

In *Texas vs. White*, 7 Wallace, 732, 13, the United States Supreme Court, thus describe the nature of the rebel State Government of Texas.

"The Legislature of Texas, at the time, &c., constituted one of the departments of a State Government established in hostility to the Constitution of the United States. It cannot be regarded therefore, in the Courts of the United States as a lawful Legislature, or its acts as lawful acts. And yet it is an historical fact that the Government of Texas then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts during the period of its existence as such, would be effectual and in almost all respects, valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States.

"It is not necessary to attempt any exact definitions within which the acts of such a State Government must be treated as valid or invalid. It may be said perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid, if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void." Action of Louisiana Judge during rebellion held valid, 45 N. Y., 27.

Among the questions oftenest presented growing out of the state of things during the war, are those in relation to the validity and obligation of Confederate money transactions.

The logic of the matter would seem to be that Confederate money, being a currency issued in furtherance of a treasonable purpose, and dealings therein were illegal; any contracts based upon it as a consideration void; and that it never had any value whatever.

Such was substantially the view of our former Supreme Court expressed in *Wright & Cantrell vs. Overall*, 2 Cold., 336; *Thornburg vs. Harris*, 3 Cold., 157; *Hale vs. Sharp*, 4 Cold., 275; *Fain vs. Headerick*, *Ib.*, 327, &c., &c. Such was also the view taken in *McCartney vs. Greenway*, 30 Texas, 755; *Hale vs. Hustan*, 44 Ala., 134; *Lawrence vs. Miller*, *Ib.*, 616; *Donley vs. Tindall*, 32 Texas, 43; (here and in the previous case, the notes on their face did not call for Confederate money; in the previous case the note was in renewal of a former note.) *O'Donnel vs. Burbridge*, 20 La., An., 37; *Pickens vs. Preston*, *Ib.*, 138; *Parker vs. Broas*, *Ib.*, 167; *Haynes vs. Rogilio*, *Ib.*, 238; *Howard vs. Yale*, *Ib.*, 451; *Succession of Lagarde*, *Ib.*, 148; *Davis vs. Lee*, *Ib.*, 248; *Fry vs. Dudley*, *Ib.*, 368; *Cockburn vs. Wilson*, *Ib.*, 39, &c., &c.

Our present Supreme Court, viewing the Confederacy substantially as a temporary legal nationality, entitled to do everything to maintain itself which the United States might lawfully do to suppress it; and that its action during the period of its power might originate rights which must, even after its suppression, be regarded as standing upon a foundation of past legality, would no doubt, if it were necessary, go the length of deciding that Confederate money was legitimately issued in the exercise of the equal belligerent rights of the Confederate Government to furnish itself with the sinews of war; and that, even if it were taken with intent to aid the rebellion, the contract was perfectly valid, and is enforceable in the courts. At least, such a decision would go no further in principle than *Smith vs. Brazelton*, and *Bank of Tennessee vs. Cummings, Admr.*, and would be a direct application of the doctrine enounced in *Conley, Admr.*, vs. *Burson*, &c., 1 Heisk., 149: "that the States of the Union at war with each other were in that war as *separate and distinct nations*."

And in the class of cases under consideration it would strengthen the impulse to sustain the transactions involved, that this would meet the natural justice of the cases. No honest man who took Confederate money voluntarily, when it was the actual currency of the region where he resided, or who made any contract with reference, either express or implied, to it, would afterwards seek to set up the illegality of the consideration, even if he might legally do so.

To enforce Confederate money contracts upon the basis of the actual value of the money at the time with interest, to quote the language of Judge Freeman in *Naff vs. Crawford*, 1 Heiskell, 127: "Works no injustice to any one; will conserve and advance the ends

of justice, and maintain the integrity of contracts solemnly entered into between man and man; while the opposite view gives the sanction of law to bad faith and dishonesty."

Considerations like these usually bend the law from the line of logical deduction.

And then in *Thorington vs. Smith*, 8 Wallace, 1, the Supreme Court of the United States have, as it seems to me, given the sanction to this rule in such cases. Since the view of the conqueror becomes the law as to matters involved in the contest, the decision of the United States Supreme Court should be regarded as conclusive of such questions as that under consideration. Let us therefore examine the decision just mentioned:

The suit was brought in 1867, on the equity side of the Court below, upon the following note:

"\$10,000.

"MONTGOMERY, Nov. 28, 1864.

"One day after date we, or either of us, promise to pay Jack Thornton, or bearer, ten thousand dollars, for value received in real estate sold and delivered by said Thornton to us this day, as per his deed to us of this date; this note, part of the same transaction, hereby declared as a lien or mortgage on said real estate, situate and adjoining the city of Montgomery.

"W. D. SMITH,

"J. H. HARTLEY."

The land was worth about \$3,000 in lawful money, and was sold for \$45,000, of which \$35,000 were paid in Confederate money, and the foregoing note given for the balance. The \$10,000 in Confederate money, at the time the note was given, would seem then to have been worth \$666.66 $\frac{2}{3}$ in lawful money. The note called simply for so many dollars, and that many dollars in lawful money were demanded.

Now what was the Court to do? Five alternatives were exhaustive of the matter, viz: Either to allow of a recovery in full of the amount of the note in lawful money, with interest; or to refuse a relief whatever, as in cases of parties in *pari delicto*, in which "*prior est conditio defendentis*"; or to remand for a cross-bill looking for a restoration of each party to his condition before the transaction; or for a cross-bill seeking to regard the vendee as having got the land for nothing, and to make him simply restore it; or to scale the note by reducing the amount of it to the standard of lawful money. The last mentioned adjustment would present itself in connection with the

third alternative, which involved the restoration of the \$35,000 paid in Confederate money or its equivalent.

The most fiercely unjust of all the alternatives was that insisted upon by the plaintiff: a recovery in lawful money of \$10,000 and interest, upon what, in effect, was a contract to pay only \$666.66 $\frac{2}{3}$ and interest. The third alternative would simply bring in a larger dose of the very difficulty sought to be evaded, since some disposition must be made of the \$35,000 paid in Confederate money. The fourth would inflict a loss upon the vendee of his payment in Confederate money,—the equivalent of \$2,333.33 $\frac{1}{3}$ in lawful money.

The second alternative would, in the particular case, not have involved great hardship. This was the rule applied during the war by the Court of Appeals of Kentucky in a similar case, which I then read but cannot now procure. The last alternative was the only one not working particular injustice, and was the one adopted by the Court, which allowed the circumstances surrounding the transaction to show that the word “dollars” meant *Confederate money dollars*, and gave to the plaintiff the equivalent of these in lawful money, with interest.

It may be said that no Confederate money consideration was here involved, since the consideration of the note in suit was *land*, a legitimate subject of contract; and that had the note been given for a loan of \$10,000 in Confederate money, the judgment might have been different,—the money loaned might have been regarded as an illegal and worthless currency. But I do not think that *this case would* have been substantially different. The Court, in effect, allowed parol testimony to add to the contract the words, “*payable in Confederate money*,” and then allowed a recovery upon *that* obligation. This necessarily involved that Confederate money was a valuable consideration, and that a contract to pay Confederate money was not illegal under the circumstances.

And then, since there was no dissent from the reasoning of the Chief Justice, I think it fair to presume, at least that this did not jar upon the views of his associates; and this reasoning goes a long way to excuse the extreme holdings of such State judges as having taken part in the rebellion, naturally had impressed upon their minds the actuality for the time being of its governmental organization. Why did Judge Swayne, or Judge Miller, or Judge Davis, sit silent under such a proposition as that the temporary actual supremacy of the Confederate Government “made obedience to its authority in civil and local matters *not only a necessity but a duty*”? Or such lan-

guage as this: "It seems to follow as a necessary consequence from this actual supremacy of the insurgent government as a belligerent within the territory where it (this money) circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying part of the territory of the United States."

This has not the ring of the North Carolina decision of the Chief Justice, already quoted.

The Chief Justice places the Confederacy in the same category with the temporary British Government set up at Castine, in Maine, in 1814, in reference to which he quotes from *United States vs. R*. 4 Wheaton, 253: "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such orders as it chose to recognize and impose."

It is true that in the former part of the opinion, after referring to a *de facto* government, obedience whereto was not treason, though hostility to the king *de jure*, he adds: that the Confederate Government was *not* such a government as this, and that it was always regarded "as simply the military representative of the insurrection against the authority of the United States. He also adds that the supremacy of the Confederate Government "did not justify acts of hostility to the United States," and that "how far it should extend to them must be left to the lawful government upon the re-establishment of its authority." But the following paragraph is a baneful potent for such antidotes:

"We have already seen that the people of the insurgent States were in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and as in the former case the people must be regarded as subjects of a foreign power, and contracts among them interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to

condition of things created by the acts of the governing power." Why not have merely said that the currency was imposed upon the inhabitants by irresistible force, and that, therefore, no fault was to be imputed to any one for taking it, and that it was thus made to have actual value, and that good faith and justice between man and man required that contracts should now be enforced with reference to the actual condition of affairs when they were made, however brought about; without any further attempt to localize in the matter?

The paragraph just quoted furnished Judge Turney with inspiration for his gunpowder decision in *Bank of Tennessee vs. Cummings*, *Adm'r*, being taken apart from its accompanying qualifications.

But to return to the subject of Confederate money: I take the fair meaning of the decision of the United States Supreme Court to be that Confederate money contracts are to be enforced upon the basis of the actual value of the money at the time of payment, with interest. And I think that this is justice, whether it is logic or not.

For cases where Confederate money transactions have been sustained, see *Dearing's Adm'r vs. Rucker*, 18 Grattan, 426; *Lohman vs. Crouch*, 19 *Ib.*; *McGill vs. Manson*, 20 *Ib.*, 527; also 5 *Bush*, (Ky.) 271; *Stahworth vs. Blum*, 41 Ala., 319; *Turley vs. Nowell*, 1 Phillips, (N. C.) Eq., 301; *Ib.*, 193; *Ib.*, 235; *Abbott vs. Dermott*, 34 Ga., 227; *Freeman vs. Bass*, 34 Ga., 355; *Ib.*, 403; 1 *Bush*, 629; 41 *Miss.*, 439; 18 *Grattan*, 703 and 708; 2 *Bush*, 398, etc., etc.

Respecting reconstruction,—the winding up of the rebellion,—little need be said. In *Texas vs. White*, 7 Wallace, 700, an exposition of the subject will be found. The theory of the matter is that from the moment when the State governments assume an attitude of hostility to the Government of the United States they cease to be governments *de jure*, and become liable to have loyal ones substituted in their room by the action of the Government of the United States, under the clause in the Constitution by which the United States guaranty to every State a republican form of government. Until loyal government is re-established, the local government must be performed by the National authority, or by its appointees. When a loyal government has been formed, its recognition as the *de jure* State government by the Government of the United States, places the State in proper relations with that Government. In most of the seceding States elections were held, under provisions of acts of Congress, for members of Conventions, to frame new State constitutions, to be submitted to Congress. In Tennessee, the National Agent,—the Military Governor,—draughted certain constitutional amend-

ments and submitted them directly to the people, at an election regulated by him; and the government formed under the Constitution thus amended, was recognized by the Nation. The so-called Convention of 1865, cut no figure in the matter, except as advised and consulted by the National Agent,—the Military Governor. The principles of reconstruction, however, obtained in Tennessee and the other States. In all alike, a State constitution was adopted by the action of the people, voting at an election held under the authority of the United States, and according to regulations prescribed by that authority. The circumstance that in the other States Constitutions were employed, was a difference of mere detail. In Tennessee the amendments to the Constitution were submitted *directly* to the people by the National authority. All that a legal Convention could have done, would have been to prepare what was as well prepared by the National Agent, with the advice of a concourse of leading men embodying about as much wisdom as an actual Convention could have contained. The essence of the matter is the action of the people of the State in response to the initiation, emanating, in no less detail, from the Nation, and the approval of that action by the latter.

The substance of the foregoing views is, that the United States is a composite State, and not a Confederation, the allegiance of the people in every State being due to the composite State, of which every State is only a member;—that the Southern movement was treason against the United States; that as soon as the rebellion had spread sufficiently to become a civil war, with a line of territorial demarkation between the parties, all living south of the line being, in legal contemplation, enemies of all living north of it; that this war was attended, with all the incidents of war between independent nations; that the Government of the United States became possessed, through the exigencies of the case, of belligerent rights, as defined by public international law, under which view is to be explained the action of the Government which has been misunderstood and its cause regarded only in reference to its ordinary sovereign or municipal powers, *e. g.*, the Confiscation Acts, the Abandoned Property Acts, etc.;—the war power of the Government comprehending the appointment by the Executive, of Military Governors of overrun districts in the enemy territory, who were lawfully empowered to exercise thereover all the necessary functions of government; that the surrenders and concessions to the rebels during the war, of belligerent rights, coming by their power, was merely in the interest of humanity, and

reference only to their treatment *during the war*, and did not protect them from the legal consequences of treason after the war was over; that no rights could be originated by the action of the rebels, hostile to the Government, capable of outlasting the war; that the triumph of the Government established *its* view of the rebellion, under which view all its transactions, from first to last, must *now* be regarded; that contracts and obligations conceived in hostility to the United States during the war, and under rebel supremacy, must nevertheless now be held to have been void; that, nevertheless, Confederate money, being imposed upon the people by irresistible force, must be treated as a currency *de facto*, and contracts for, or with reference to, its payment enforced upon the basis of its actual value with interest; that the Confederacy was not a *de facto* government, being merely the military representative of rebellion, but that the rebel State governments, while they ceased to be rightful from the moment when they ceased to be loyal governments, yet *were de facto* governments, and their action valid where devoid of political significance, and such as might have emanated from a loyal government; that it devolved upon the Government of the United States, under the guaranty clause in the Constitution, to displace these *de facto* State governments, and take the initiative in the re-establishment of loyal republican government in the States, which has been done by submitting through National instrumentalities, and under National regulations, as to the qualifications of voters, manner of holding elections, etc., etc., opportunities of adopting plans of State re-organization, which, when approved by Congress, should result in the re-adjustment of the States, respectively, to their normal relations to the Union.

R. MCPHAIL SMITH.

Nashville, Tenn.

Digest of English Law Reports for Dec., 1872, and Jan..

(COMMON LAW AND EQUITY SERIES.)

ACT OF BANKRUPTCY.—See ASSIGNMENT OF DEBTOR'S WHOLE PROPERTY; AND DISPOSITION.

ADJOINING COAL MINES.

Where coal has been wrongfully taken by working into the mine of an owner, the trespasser (in the absence of any suggestion of fraud) will be treated as a purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trading expenses) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *In re United Merthyr Tydfil Coal Company*. V.-C. B., 46.

ADMINISTRATOR DURANTE MINORE ETATE.

A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore etate*. *Monsell v. Armstrong*. M. R.

ADVANCEMENT.

A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, and during his life received the rent and paid the outgoings.

Held (notwithstanding evidence of declaration that the cottage was the son's after his father's death), that the purchase was not an advancement. *Stock v. Stock*. V.-C. W., 55.

APPLICATION FOR SHARES.

An applicant for shares in a company denied that he had received the letter of allotment, which was posted in London on the 16th of March, and should have been received on the 17th; and, having written on the 17th recalling his application, applied to have his name removed from the list of contributories.

Held, that the unsupported evidence of the applicant was not sufficient to show that the letter of allotment which was posted had not been received, and that his name must therefore be retained upon the list. The Court expressed an opinion that if the letter of allotment had not been received the contract to take shares was not binding upon the applicant as soon as the letter was posted.

British and American Telegraph Company v. Colson (Law Rep., 6 Ex. 108), approved of. *In re Imperial Land Company of Marseilles*. *Wall's case*, V.-C. M.

APPOINTMENT BY WILL.

A power given to A. to appoint by any deed or instrument in writing, without power of revocation, to be by her signed, sealed and delivered in the presence of two or more credible witnesses:—

Held, to be well exercised by an appointment by the will of A., not expressed to be signed, sealed and delivered, but stated in the attestation clause to be "signed, sealed, published,

knowledge and declared to be her last will," in the presence of the attesting witnesses. *Smith v. Adkins*, M. R., 402.

APPOINTMENT.—See EXCESSIVE APPOINTMENT.

ASSIGNMENT.—See EQUITABLE ASSIGNMENT; ASSIGNMENT OF DEBTOR'S WHOLE PROPERTY.

Payment of bills by the drawer at the request of the acceptor, who, in consideration thereof, assigns to the drawer all his property to secure the amount and also certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy.

Therefore, where, at the request of T., I., M., & Co. paid the amount due on certain bills drawn by them and accepted by T., and T. assigned to them his interest in certain marine engines and machinery (which constituted his whole property) as security for the moneys due on the bills, and also for other moneys due from him to them:—

Held, that the assignment was not an act of bankruptcy. *Ex parte Reed & Steel*, *In re Tweedell*, C. J. B. 586.

BANKER.

The plaintiff having an account at the L. branch of the defendant's bank, which shewed a balance to his credit exceeding 23*l.*, drew cheques to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to his whole account, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the cheques on presentment. There was no special contract between the parties that each account should be kept separate:—

Held, that the bank was entitled at any time to combine the accounts, and to charge the L. account with the B. debt. *Garnett v. McKean*, (P. O.) Ex. 10.

BANKERS' ACCOUNT.

The O. Bank kept three accounts at the A. Bank, namely, a loan account, a discount account, and a general account. They from time to time received advances from the A. Bank, which were entered in the loan account, and to meet which they deposited securities with the A. Bank. In the course of the transactions the O. Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The O. Bank became insolvent and was wound up:—

Held (affirming the decision of *Malins, V.-C.*), that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that the balance of the loan account being satisfied, the A. Bank might retain the bills for the balance of the general account. *In re European Bank*. *Agra Bank Claim*, L. JJ., 41.

BANKERS' LIEN.

A company deposited title deeds with a bank "as collateral security for bills under discount." At the time the company was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, and the securities realized more than was sufficient to cover the latter bills:—

Held, that the company could effect a mortgage by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mortgage deeds; that the bankers were not in the position of officers of the company, who were bound to see that the required formalities were complied with,

and that the bank was entitled to hold the balance of the proceeds upon the securities, to meet the whole amount due to them by the company. *In re Provident Assurance Company. Ex parte National Bank*, V.C. M., 507.

BILLS UNDER DISCOUNT.—See BANKERS' LIEN.

BREACH OF COVENANT.—See MEASUREMENT BY DISTANCE.

BREACH OF DUTY.—See MISCONDUCT OF DIRECTOR.

CHARITY SCHEME.

By a scheme for a charity connected with a grammar school at G., it was provided that the income should be applied toward the maintenance of a scholar at the said school, such scholar to be the child of any resident of the town of G., preferred by the trustees, *ceteris paribus*, to the son of a freeman of G., such scholar having been educated at the said school, and tried and examined in Greek and Latin and approved by certain examiners, whose examination and approbation should be delivered to the trustees, who should thereupon proceed to elect a scholar as aforesaid. On a vacancy there were two candidates, A., the son of a freeman of G., and D., the son of a non-freeman. The examiners reported to the trustees that D. was superior in every respect, but that they believed that A., if admitted to the said school, would be able in due time to pass the required examinations. The trustees elected A. to the scholarship.

On a petition by D. praying that the examination might be set aside:—

Held, that the scheme did not provide for a test, but a competitive examination; that the trustees should, under the circumstances, have followed the recommendation of the examiners; that the election must be set aside, and D. elected to the scholarship. *In re Nettle's Charity*, M. R., 434.

COLLATERAL SECURITY.—See BANKERS' LIEN.

COLOURABLE IMITATION.

The plaintiff, the publisher of a work which he claimed to have originated, published "*The Birthday Scripture Text Book*," consisting of a printed dairy interleaved with blank space opposite each day with a text of Scripture appended, and which was signed as a record of the birthdays of friends:—

Held, entitled to an injunction to restrain the defendants from publishing a work subsequent to the plaintiff's, called "*The Children's Birthday Text Book*," on the ground that it was an infringement of the plaintiff's copyright in the plaintiff's work, as well as a colourable imitation of the same. *Mack v. Petter*, M. R., 434.

COMMON.

If evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, in the absence of proof that it was modern, is deemed to have taken place in legal memory. The corporation of Colchester claimed and had from time immemorial exercised, either by actual enjoyment (by the free burgesses) or by receipt or acknowledgement, an exclusive right of common of pasture in certain land within the walls of the town (including a farm called Drury Farm), and containing about 1,023 acres in scattered portions, for all cattle, sheep, and other common animals levant and couchant within the borough, from Lammas to Candlemas, and to any part of the land sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry. The corporation had also, from time immemorial, a right of common of pasture in certain land within the walls of the town (including a farm called Drury Farm), and containing about 1,023 acres in scattered portions, for all cattle, sheep, and other common animals levant and couchant within the borough, from Lammas to Candlemas, and to any part of the land sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry. The corporation had also, from time immemorial, a right of common of pasture in certain land within the walls of the town (including a farm called Drury Farm), and containing about 1,023 acres in scattered portions, for all cattle, sheep, and other common animals levant and couchant within the borough, from Lammas to Candlemas, and to any part of the land sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry.

commencing in the reign of Henry VIII., exercised the right of releasing for valuable consideration,—sometimes a gross sum, and sometimes a quit-rent,—their rights of common over certain of the lands subject thereto, still continuing to exercise them over the rest, as before, without any resistance thereto on the ground that the release of part of the land extinguished the whole right of common. In some instances, also, the common rights of the corporation had been conveyed to strangers, who had exercised such rights. Down to 1834, the right of common over about 831 acres had been so sold or released. The plaintiff was lessee of Drury Farm under one Steele, who became possessed of the property in 1838. In the previous title deeds, which went back to 1583, there was no mention of the right of common; and the conveyance of 1838 was made “subject to any rights or privileges which the corporation, or any person claiming under them, might possess over the same.” The defendant, (who was a free burgess of Colchester), claiming the right of common over 110 acres, part of Drury Farm, under a conveyance of January 10, 1870, from a grantee of the corporation, turned his cattle upon the plaintiff’s land. Upon a case stated for the opinion of the Court, with power to the Court to draw inferences of fact:—

Held, that the proved exercise of the right was reconcilable with, and only to be legally accounted for by, the assumption that the right of common was originally granted to the corporation in gross out of the land and each atom thereof, with power to grant or release any part, as in the case of a several pasture; and, consequently, that the right of common was not defeated by the grant or release of part,—upon the principle that “antiquity of time justifies all titles, and supposes the best beginning the law can give them.” Levancy and couchancy is a mere measure of the number of cattle or other animals that may be put upon the common, and does not necessarily indicate appurtenancy. *Johnson v. Barnes*, C. P., 592.

CONSTRUCTION OF GRANT.—See RESERVATION OF MINERALS.

CONTRACT, FAILURE TO PERFORM.—See MEASURE OF DAMAGES; RESCISSION OF CONTRACT.

CONVERSION.—See EXCESSIVE APPOINTMENT.—2.

COPYRIGHT.

1. There is no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one may sell.

Where an upholsterer who had published an illustrated furnishing guide with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain the defendant, another upholsterer, from publishing, for the purposes of his own trade, a similar work in which many of the said engravings and portions of the letterpress of the first work were alleged to be copied:—

Held, that the defendant could not be restrained by injunction from so copying the plaintiff’s illustrations or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the defendant’s work being a flagrant imitation of the plaintiff’s he could be allowed no costs. *Corbett v. Woodward*, M. R., 407.

2. The plaintiffs are the proprietors of a weekly periodical called “*Punch*.” Between the years 1849 and 1867 they published in nine several numbers nine cartoons, with descriptive writing underneath them with reference to the Emperor Napoleon III. In 1871 the defendant published a work called “*The Man of his Time*,” consisting, first, of the “*Story of the Life of Napoleon III.*,” by James M. Haswell; and, secondly, of “*The same Story as told by Popular Caricaturists of the last Thirty Years*.” Among the caricatures in part 2, were copies in a reduced form, sometimes with and sometimes without the descriptive writing, of the nine cartoons above men-

tioned. No consent from the plaintiffs to this reproduction had been obtained, an action by them for infringement of their copyright in the several books or "of letter-press" containing the cartoons:—

Held, that a substantial part of the plaintiffs' books, or sheets of letter-press, had been appropriated, and that they were entitled to recover. *Bradbury v. Hotten*.

CUSTOM OF STOCK EXCHANGE.

The plaintiff, through his stockbroker, contracted with the defendant, a jobber in the Stock Exchange, for the sale of fifty shares in a company. On the same day the defendant gave in to the plaintiff's brokers a ticket with the name of L. as intended purchaser, which had been passed to him by another jobber. A transfer of L. was accordingly executed by the plaintiff, but it was afterwards discovered that L. was an infant, and the transfer was never registered. In a suit by the plaintiff against the defendant for an indemnity against calls:—

Held, (reversing the decision of *Bacon*, V. C.,) that the defendant, not having given the name of a transferee who was capable of accepting the transfer, was not discharged from liability, although the ten days limited by the rules of the Stock Exchange for objecting to a proposed transferee had expired before the execution of the transfer.

Masted v. Paine (1st action) (Law Rep. 4 Ex. 81) approved.

Rennie v. Morris (Law Rep. 13 Eq., 203) overruled.

Observations on the judgment of Blackburn, J., in *Masted v. Paine* (2d action) (Law Rep., 6 Ex., 132).

In sales of shares on the Stock Exchange the ultimate contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named on the ticket, who are brought together by means of the jobber; and, therefore, until a person is named who is capable of contracting, and who has given authority for the use of his name, the jobber is not discharged from liability to the vendor. *Merry v. Nickalls*, L. J.J., 733.

DAMAGES.—See MEASURE OF DAMAGES.

DELEGATED POWER.—See EXCESSIVE APPOINTMENT—1.

DEVASTATION.—See EXECUTOR.

DEBT.—See LEGACY CHARGED AS A DEBT.

EQUITABLE ASSIGNMENT.

B. consigned to the defendants by the ship *Acacia* a cargo which had been purchased at the joint risk of himself and the defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The defendants replied, promising to protect the bills. B. indorsed to the plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of £ — — — — —, which place to account cargo per A." B. having stopped payment, the defendants refused to accept the bills; but after selling the cargo, offered to pay to the plaintiffs the surplus of the proceeds, after satisfying a balance due to them from B. on their general account between them. The plaintiffs refused to accept this, and filed a bill, claiming a lien for the full amount of the three bills:—

Held, (affirming the decision of the Master of the Rolls,) that the plaintiffs had a lien on the proceeds of the cargo.

Frith v. Forbes (4 D. F. & J. 409) discussed. *Robey & Co.'s Perseverance Iron Works v. Ollier*, L. J.J., 695.

EQUITABLE SET-OFF.

To a declaration for money lent and paid and commission the defendant pleaded for a defense on equitable grounds, that it was agreed between the plaintiff

himself, on the following terms, viz., that he should consign certain rice to the plaintiffs' firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment, and that the plaintiffs should sell the rice, and satisfy out of the proceeds the said advances, expenses and commission, and pay to defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to the plaintiffs under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and insufficient to satisfy the advances, expenses and commission, whereas it would, but for their negligence and misconduct, have realized sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct.

Held, a bad plea. *Best v. Hill*.—C. P., 10.

ESTATE TAIL.—See LEGACY CHARGED AS A DEBT.

ESTATE FOR LIFE.—See EXCESSIVE APPOINTMENT, 2.

ESTOPPEL.—See EXECUTOR.

EVIDENCE.—See EVIDENCE OF NUISANCE. APPLICATION FOR SHARES.

EVIDENCE OF NUISANCE.

The amount of annoyance which will induce the Court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value of evidence in such cases considered.

Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the Court will not exercise its jurisdiction, but will leave the Plaintiffs to their rights at law.

Decree of the Master of the Rolls reversed. *Gaunt v. Fynney*, L. C., 8.

EXCESSIVE APPOINTMENT.

1. Where the donee of a power appointed by will a life interest to M., an object of the power, and then delegated to M. a power to appoint a life interest to a stranger to the power, and subject thereto appointed the property to the children of M., who were objects of the power:

Held, that the delegated power was void, but that the subsequent appointment was good. *Carr v. Atkinson*, M. R., 397.

2. Husband and wife, having a joint power of appointment over personalty in favor of the children of the marriage, of whom there were three survivors, appointed part of the fund to trustees upon such trusts as H. (one of the sons) should by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of the father's will, or by will appoint; and in default of such appointment upon trust for H. for life, or until bankruptcy or assignment; and after H.'s death, upon trust for his executors or administrators; but if such interest should have determined, upon such trusts as would have affected the property if the same had been appointed to H. during his life, or until such determination only:

Held, that the above appointment was valid only to the extent of giving to H. an estate for life, or until bankruptcy or assignment; and that, as to all the rest, it was void.

Husband and wife had a joint power of appointment over real estate amongst the children of the marriage. In default of appointment, the estate was to be held, sub-

ject to the parent's life interests, in trust for all the unappointed children, to vest at twenty-one or marriage. The settlement contained a power of sale, but no trust for sale.

A son attained twenty-one and died intestate. Afterwards the husband appointed two-fourths of the real estate, and declared that the shares of the son were beneficially interested in the capital arising from any sale of the premises of the quality of personal estate. A sale having taken place under the power, the settlement.

Held, that the interest of the heir of the deceased son was defeated by the settlement. *Webb v. Sadler*, V.-C. B., 533.

EXECUTOR.

In an action against an executor, a plea of *plene administravit* was pleaded. The action having been referred, the arbitrator found against the defendant upon the plea, and the plaintiff accordingly signed judgment. The plaintiff afterwards brought his action upon the judgment against the defendant, suggesting a devastavit. The defendant sought to set up, by way of defense, facts which tended to show that though assets had come to his hands before the judgment, and had been appropriated, such misappropriation had taken place with the consent and ratification of the plaintiff, and that he was therefore estopped from complaining. *Held* (affirming the decision of the Court below,) that if the facts which the defendant sought to set up amounted to a defense, they might have been received under the plea of *plene administravit*; and the defendant could not set them up as negating the devastavit. *Jewsbury v. Mummery*, 10 Ch., 156.

FAILURE OF TRUST PURPOSE.—See GIFT.

GENERAL BALANCE ACCOUNT.—See BANKERS' ACCOUNT.

FALSE IMPRISONMENT.—See MASTER AND SERVANT.

GIFT.

By a separation deed a sum of money was directed to be held by trustees in trust for the wife for life, and after her death, as to four-sixths parts thereof for F. W., one of the children of the marriage, who was then an officer in the army, and after his death for his children. And it was declared that it was lawful for the trustees, if in their discretion, they should think fit, to apply a portion of the fund, not exceeding £2,000, in or towards effecting the purchase of F. W. in the army. The trustees applied £850 in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, the Royal Warrant of the 20th of July, 1871, no further sum could be applied for the same purpose.

Held, that the purpose for which the power was given to the trustees was not the residue of the sum of £2,000 could not be raised and applied in any way for the benefit of F. W. *Palmer v. Flower*, (1,) distinguished. *In re Wards'* Will, 10 Ch., 727.

IMMEMORIAL EXERCISE OF RIGHT.—See COMMON, 727.

INFRINGEMENT OF COPYRIGHT.—See COLOURABLE IMITATION.

INJUNCTION.—See COLOURABLE IMITATION; RESERVATION OF MINERAL RIGHTS.

INSURABLE INTEREST.—See SHIP OR SHIP'S POLICY.

INSPECTION OF DOCUMENTS.

Communications between a person and his solicitor or counsel, or any person acting as their deputy, with a view to obtain legal assistance and advice, are

The Court cannot compel them to be disclosed. Communications with any other person, although taking place after litigation is contemplated, are not necessarily privileged; but it is in the discretion of the Court, to compel or abstain from compelling their production. If such communications are substantially rough notes for use to be laid before the legal adviser, or to supply the proof to be inserted in evidence, the discretion of the Court ought, as a general rule, to be to refuse inspection. Where they fall short of this, it should, as a general rule, be granted. *Fenner v. London and South Eastern Railway Co.*, Q. B., 767.

TRUSTMENT BY TRUSTEES.

Trustees were charged with the loss occasioned by an investment of the trust money on insufficient security. The property was a hotel in the country, and the trustees had sent down a London surveyor who valued the hotel, including therein the furniture, at nearly double the sum to be advanced. The hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made.

Re Budge (reversing the decision of *Bacon*, V. C.), that the trustees were chargeable with the loss so advanced. *Budge v. Gummow*, L. JJ., 719.

LIABILITY OF TO VENDOR.—See CUSTOM OF STOCK EXCHANGE.

ES.—See SURETY.

ANCY AND COUCHANCY.—See COMMON.

RES.—See RESERVATION OF MINERALS.

CHARGE CHARGED AS A DEBT.

Testator, by will dated in 1857, bequeathed to his wife all sums of money that should come to his hands as part of her patrimony for her sole use and benefit, with the power of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the sum due to her, being in fact a charge upon the property; and if she so desired, the will was as well as all just debts and obligations due from him, to be discharged as the assets of his executors.

It was held, that the wife's patrimony was to be treated as a debt, and a charge on the residuary realty devised property as well as the rest of the property.

The wife was entitled to the free occupancy of a house for the term of years, and the free occupancy of a house for the term of years, after which the effects to revert back to the estate.

It was held, that the free occupancy of the house entitled the wife either to reside in it for the term of years, or to let it during her life.

The residue to sons and daughters of an equal share in all the income of real property.

It was held, that the devise of the income of the estate passed the fee.

The court held, that any property might be sold except *Glencoe*, which was to remain in the family as long as there was a lineal son descendant of before named sons, and if there was no male descendant from the eldest, the next to be entitled, and so on.

It was held, that this clause created an estate tail in possession in the eldest named son.

Coz v. Greener, V.-C. M., 456.

LIABILITY OF DIRECTORS.

Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter signed by the three as directors requesting the bank to honor cheques signed by two of the directors and countersigned by the company. The account having been largely overdrawn by means of such cheques, the bank sued the company at law, recovered judgment in 1865, and issued an execution. The

proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable.

Held, (reversing the decision of *Bacon*, V. C.), that the letter did not make the directors personally responsible for the debt, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and assuming that representation to be erroneous, this was not a misrepresentation of fact which the directors were bound to make good, but only a mistaken representation of law, and, moreover, that even if it had been such a false representation as the directors were bound to make good, the bank would have had no claim against them, as they had been able to enforce the same remedies against the company as if the representation had been true.

Semble, that the letter did not involve any representation that the directors had any other power than the ordinary powers of directors.

In 1864, a negotiation took place between the company and the bank as to the company giving security for the overdrawn account, and, in December, 1864, the bank manager wrote to the Secretary of the company, "I am directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and J. A. B., to be held for the bank as collateral security, and I am requested that your unissued debentures are to be transferred into the same names, and undertake to do this when you are in a position to issue them." The secretary replied that the directors assented, and had directed him to allot the shares to the bank manager and J. A. B., as collateral security. In the following month, the company's directors sanctioned the issue of the preference shares, the Secretary wrote, "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank. I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you and J. A. B. on your actual understanding that they are to be held by you only as collateral security for the debt due to the bank." The manager replied, "I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." The preference shares were accordingly issued to two of the directors, and transferred by them to the bank manager and J. A. B., and debentures given to the same two directors, which were similarly transferred. Nothing had been paid on the shares, and the company were not yet in a position legally to issue the debentures.

Held (reversing the decision of *Bacon*, V. C.), that the above circumstances did not make the directors personally liable, and that, on the construction of the correspondence, the directors had not made any representation that the shares and debentures were valid and fully paid-up shares and debentures, but the nature of the agreement was only that the shares and debentures should be placed under the control of the bank, so that when they were taken up by the public the money paid for them should come to the hands of the bank.

Colten v. Wright, 8 E. & B., 647; *Richardson v. Williamson*, Law Rep., 6 Q. B. 1; and *Cherry v. Colonial Bank of Australasia*, Law Rep., 3 P. C., 24, distinguished; *Dall v. Ford*, Law Rep., 2 Eq., 750, approved; *Beattie v. Lord Ebury*, L. J.

LIABILITY OF MASTER FOR ACTS OF SERVANT.—See MASTER AND SERVANT.
LIABILITY OF TRUSTEES.—See INVESTMENT BY TRUSTEES.

LIBEL.

The fair and honest discussion of, or comments upon, a matter of public interest is a point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice. The plaintiff, a naval architect, in 1867 submitted to the Admiralty

plans for the conversion of the old wooden line-of-battle ships of the navy into iron-clad turret-ships. His proposals were considered by the Admiralty and rejected. In September, 1870, the iron-clad turret-ship Captain, whilst on a cruise, capsized and sunk, with all hands. This disaster caused great excitement and anxiety in the public mind; and, with a view to explain the circumstances under which the Captain had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern warfare, a minute was prepared by the first Lord of the Admiralty for presentation to Parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was enclosed a letter upon the subject addressed to the Board in September, 1867, by Sir George Robinson, then controller of the navy, which letter contained this passage: "These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief controller of the navy," and concluded by recommending their rejection. The minute was by order of the Lords of Admiralty, printed by the defendant, the Queen's printer; copies of it were publicly sold by him before the meeting of parliament. At the commencement of an action for this alleged libel, the judge,—assuming the letter to be *prima facie* libellous, and it being conceded that the publication was without malice,—nonetheless held for the plaintiff, on the ground that it was a fair criticism upon a matter of public and national importance, and, therefore, privileged.

Held, by Willes, Byles, and Brett, J.J., that the non-suit was right.

Held, by Grove, J., that the publication was not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it was not in the nature of a fair criticism of matter before the public, or, at all events, that it was not so clearly within the limits of such privilege as to be removed from the consideration of a jury. *Hewood v. Harrison*, C. P., 606.

—See EQUITABLE ASSIGNMENT; BANKERS' LIEN; BANKERS' ACCOUNT.

INSURANCE.—See SHIP OR SHIP'S POLICY.

MASTER AND SERVANT.

The plaintiff was a passenger by the defendant's railway, with a return ticket from N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the inspector of the defendants' station upon the charge of refusing to pay his ticket, or pay his fare, and thereby defrauding the defendants. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment.—

Held, that, as the defendants were empowered under s. 104 of the above Act, to arrest persons committing frauds under s. 103, and as the inspector was their representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendants to arrest persons supposed to be committing offenses against that section, and that the defendants were liable for his mistake. *Moore v. The Metropolitan Railway Company*, Q. B., 36.

MEASUREMENT OF DISTANCE.

The defendant covenanted with the plaintiff not to carry on the business of a public-house within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest route of public access:—

Held, (affirming the judgment of the Court below,) that there had been a breach of the covenant. *Moufet v. Cole*, Ex., (Ex, Ch.,) 32.

MEASURE OF DAMAGES.

The plaintiffs, who were under contract to supply a quantity of military shoes to H., in London, (for the use of the French army,) at 4s. per pair, an unusually high price, to be delivered there by the 3d of February, 1871, sent the shoes to defendant's station at K. in time to be delivered in the usual course in the evening of the 2d, when they would have been accepted and paid for by the consignee; and the defendant's master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so delivered they would be thrown on their hands; but no notice was given to the defendants that the contract with H. was, owing to exceptional circumstances, not an ordinary contract.

The shoes not arriving in London until the 4th, H. rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1s 3d. per pair,—2s. 9d. per pair, below the ordinary market value.

In an action against the defendants for their breach of contract, they paid to the Court a sum sufficient to cover any ordinary loss occasioned by the delayed delivery, but the plaintiffs further claimed 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes to H. and the price which they ultimately fetched:—

Held, that they were not entitled to recover the latter sum, the damage not being the natural consequence of the defendants' failure to perform their contract, and the defendants not having had notice that the sale to H. was at an exceptionally high price.

Horne v. Midland Railway Co., C. P., 583.

MISCONDUCT OF DIRECTOR.

A director of a company induced three of his children, who were minors, to take shares. Shares were allotted to each, and he gave them money to pay the calls payable on allotment. All the shares in the company were allotted. The company never paid any dividend, and an order for winding it up was made before any of the children had attained twenty-one. The infants were placed on the list of contributory shareholders, and an order was made against each for payment of an arrear of calls during their infancy having been discovered, no attempt was made to enforce it:—

Held, (affirming the order of the Vice-Warden of the Stannaries,) that the company was liable to pay the amount of these calls, as a loss occasioned to the company by the director's breach of duty as director in having shares allotted to infants. *In re Crewe and Northwich United Mining Company*, *Ex parte Wilson*, L. JJ., 45.

MISREPRESENTATION.—See LIABILITY OF DIRECTORS.

MORTGAGE.—See BANKERS' LIEN, POLICY OF ASSURANCE.

NOTICE.—See MEASURE OF DAMAGES.

NUISANCE.—See EVIDENCE OF NUISANCE.

ORDER AND DISPOSITION.

On the 23d of September H. discounted for P. two bills of exchange payable to the order of H. on the 12th of October, and P. gave H. a bill of sale as security, requesting him to register it unless the bills were dishonoured at maturity. H. accordingly did so. On the 12th of October the bills were dishonoured, on which H. took up the bills, and P. gave him two fresh bills for the same amount, and a new bill of sale for the same chattels. On the 30th of October the new bills were dishonoured, and P. gave directions to take possession of the chattels. Early on the 31st a broker

session, but could not on that day get into the house where they were. On the day the bill of sale was registered, and P. committed an act of bankruptcy by filing a petition for liquidation, on which he was subsequently adjudged bankrupt. On the 1st of November H. obtained possession of the goods:—

(reversing the decision of the Registrar,) that the goods belonged to H. and not to P. as trustee in bankruptcy, for that they were not in the order and disposition of P. as bankrupt with the consent of the true owner at the time of the act of bankruptcy; that the Bills of Sale Act did not apply; and that the transaction was not in substance being a scheme to evade the provisions of that Act. *Ex parte Harris. In re Harris. L. JJ., 48.*

ASSIGNMENT.—See ASSIGNMENT OF DEBTOR'S WHOLE PROPERTY.

ADMINISTRATOR.—See EXECUTOR.

POLICY OF ASSURANCE.

A policy effected by A. on his life was mortgaged in 1868 without notice to the assured. A. became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B. who had no notice of the bankruptcy. After the death of A., B.'s solicitor applied to the office that this and other policies were mortgaged, and that he acted as mortgagee, not naming them. Subsequently notice of bankruptcy was given to the office.

It was held that this was sufficient to give priority to B. over the creditors in the bankruptcy of the assured. *Stuart v. Cockerell* (Law Rep., 8 Eq., 607,) followed. *In re Russell's Policy* (15 W. R., 529,) not followed. *In re Russell's Policy Trusts*, V.-C. M., 26.

POWER OF APPOINTMENT.—See APPOINTMENT BY WILL.

POWER OF SALE.—See EXCESSIVE APPOINTMENT, 2; ADMINISTRATOR DURANTE VITAE; INCURSED ESTATE.

PRIVILEGED COMMUNICATIONS.—See INSPECTION OF DOCUMENTS; PRODUCTION OF DOCUMENTS; LIBEL.

PRODUCTION OF DOCUMENTS.

A writ was issued for a suit against a company for specific performance of a contract dated in 1863, by which a statement was required from the company of correspondence passing, before the institution of the suit, between the former engineer and solicitors of the company, and between the present solicitors and the secretary and the agents, sub-agents, engineers, surveyors, and directors of the company, and cases and opinions of counsel advising the company, and all of the company in respect of the subject-matter of the suit:—

It was held, that the whole of this correspondence relating to the subject-matter of the suit, which might lead to litigation, whether it had done so or might do so, or whether it was probable or improbable that it would do so, was privileged, and production was refused. *Lord Walsingham v. Goodricke*, 3 Hare, 122, and *Hawkins v. Gaskell*, 1 Sim. (N. S.), 150, not followed. *Wilson v. Northampton and Banbury Junction Railway Company*, V.-C. M., 477.

Documents passing between the defendants or their agents and their solicitor *ante litigatum*, and stated in the affidavit as to documents to be "confidential communications between solicitor and client with reference to matters which are now in question and at issue," are described sufficiently to protect them from production. *Manser v. Manser*, K. & J., 451-460, followed. *Macfarlan v. Rolt*, V.-C. W., 580.

POLICY.—See POLICY OF ASSURANCE.

PRIVILEGED DOCUMENTS AND COMMUNICATIONS.—See PRODUCTION OF DOCUMENTS.

SECURITY BY SURETY.

The directors of a company, by way of security for any balance which might be

due from the company to a bank, gave the manager of a branch of the promissory note for £2,000, and the manager indorred the note to the company was wound up. The bank proved in the winding up for £3,650, the company to the bank, and was declared entitled to a dividend of £1,000 sum. The bank afterwards brought an action against one of the makers who paid the bank £2,067 for debt and interest due on the note:

Held, (affirming the decision of Bacon, V. C.,) that the giving of the note was in substance of an ordinary contract of suretyship, and that the surety who had paid £2,067 was entitled to receive from the bank a share of the dividend, in the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank.

The rule established by *ex parte Turner*, 3 Ves. 243, that in similar cases the sum paid by the surety is, in calculating the proportions of dividend, to be considered as expunged, does not apply to cases in winding up. *Gray v. L. J.*, 680.

RECALLING APPLICATION.—See APPLICATION FOR SHARES.

RESCISSION OF CONTRACT.

The defendants agreed to supply the plaintiffs with from 6,000 to 8,000 tons of coal to be delivered into the plaintiffs' wagons at the defendants' colliery in monthly quantities during the period of twelve months, at 5s. 6d. per ton. In the first month the plaintiffs sent wagons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to supply any more coal:—

Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. *v. Rennie*, 5 H. & N., 19; 29 L. J., (Ex.) 73, discussed. *Simpson v. Cripps*.

RESERVATION OF MINERALS.

In 1799 the Duke of Cornwall, as lord of a manor, granted the freehold of the land to the copyholder, reserving "all mines and minerals within the premises, with full and free liberty of ingress, egress and regress, to search for, and to take, use, and work the said excepted mines and minerals, and to do all things necessary and proper to be done in and about the same, and to have full power to do the same, without any deed not containing any provision for compensation. Under the tenement of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the duchy, though the existence of tin was well known. It was admitted that china clay could not be gotten without totally destroying the surface in the process of getting tin by "streaming," which was an ancient, and at the time the most usual mode of getting tin, was almost equally destructive to the surface. The owner of the surface to restrain the owner of the minerals from getting tin. Having been dismissed by Wickens, V. C., on the ground that the reservation of china clay with the power to get it:—

Held, on appeal, that the china clay was included in the reservations, and that the surface-owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface.

When a land owner sells the surface, reserving to himself the minerals, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to shew clearly that he intended to have that power.

The deed granted the property by the description of "All that copyhold tenement called *Greys*, consisting of a house with divers parcels of land containing 103 acres (it is to say)"—then followed parcels, concluding with "a parcel of land running to G. Moor, containing twenty-seven acres, which said tenement called *Greys* is held for the life of G. H. by copy of court roll":—

Held, that on the construction of this grant, a piece of uninclosed land, containing twenty-seven acres, and forming part of the waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing to answer the twenty-seven acres mentioned in the deed, and the 103 acres could be made up without it.

The defendants, G. and J., who were entitled to the minerals under *Greys*, had granted a lease to their co-defendants of the china clay under various lands, including a great part of *Greys*. The lessees had entered *Greys* for the purpose of getting china clay, but had not got any, and long before the bill was filed had ceased to occupy any part of that estate, and were getting clay only from the twenty-seven acres which the plaintiffs claimed to be owners, but to which they were decided not to be entitled. The defendants by their answers stated that they had no intention of getting clay at present out of *Greys*, but they insisted that they were entitled to do so:—

Held, that the defendants "threatened" to get the clay so as to give the Court jurisdiction to interfere by injunction. *Hext v. Gill*, L. J.J., 699.

RESTRAINT OF TRADE.

A covenant by a clerk and traveler with a firm of brewers that he would not, during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or commendation, either on his own account or for any other person, public company or corporation, of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale, beer, or porter brewed by the plaintiffs:—

Held, void, as unnecessarily extensive. *Allsopp v. Wheatcroft*, V.-C. W., 59.

SET-OFF.—See EQUITABLE SET-OFF.

INSURANCE.—See COMMON.

LOSS OF SHIPS POLICY.

C. & Co., ship owners, were in the habit of receiving shipments of cotton to be carried on deck, sometimes at the shipper's request and at his risk, in which case the bill of lading expressed it to be so shipped, and sometimes for their own convenience, in which case it was at their own risk, and a clean bill of lading was given. To protect themselves against probable loss by jettison in the case of cotton shipped as last mentioned, C. & Co., through the plaintiff, their insurance broker, had effected with the defendants, on the 29th of March, 1864, an open policy to a certain specified amount, to be subsequently declared on. A parcel of cotton consisting of 102 bales was shipped on the 20th of December, 1864, at Alexandria, on board a ship belonging to C. & Co. This cotton was intended to be shipped on deck at shipper's risk, but by mistake C. & Co.'s agent gave a clean bill of lading in respect of it. Being supposed to be at shipper's risk, it was not declared under the policy, but other shipments of cotton on various vessels, some of them subsequent in date to the shipment of the 20th of December, were declared to the full amount of the policy. The 102 bales were lost by jettison, and the holders of the bill of lading claimed payment of the value of the cotton. The plaintiff thereupon altered the declarations on the policy by declaring the 102 bales, in substitution for a portion of the cotton subsequently shipped. According to the usage of the insurance business, as found in a special case stated between the plaintiff and defendants in an action to recover the

value of the 102 bales on the policy of the 29th of March, in the case of policies on goods to be shipped, in which order the assured is bound to declare them. In case of mistake as to the order of shipment he is bound to rectify the declarations, and this is sometimes done even after loss:—

Held, that C. & Co. had an insurable interest in the 102 bales of cotton, inasmuch as by the terms of the bill of lading, signed by their agent, and by which they were bound, the cotton was at their risk; that the usage, as stated in the case, was binding since it was not unreasonable, and by virtue of it the declaration on the policy might be rectified even after the loss was known; that even apart from the usage as stated, the doctrine to be deduced from the authorities is that, according to the usage of merchants and underwriters recognized by the Courts without parol proof in each case, a declaration may be altered even after the loss is known, if such alteration be made without fraud, of which there was no evidence in the present case; and that the plaintiff was, on these grounds, entitled to recover the value of the 102 bales on the policy of the 29th of March. *Stephens v. The Australasian Insurance Company, C. P., 1871.*

SPECIFIC PERFORMANCE.—See PRODUCTION OF DOCUMENTS.

SURETY.

The plaintiffs lent to B. & P., who were traders, 300*l.*, for the repayment of which the defendant became surety. At the time of the loan B. & P. assigned by deed of the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and for the payment of interest on the 25th of February, 1871, and stipulated, that until default in payment of either the principal or interest, B. & P. should continue in possession of the premises assigned to the plaintiffs; and that upon such default the plaintiffs should not be bound to give B. & P. one month's notice in writing. This deed was not registered under 17 & 18 Vict. c. 36. B. & P. failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B. & P. were insolvent, but they allowed them to continue in possession, and on that day B. & P. filed a petition for liquidation under the Bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed:—

Held, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security to the surety, and that owing to their negligence he was discharged to the amount that the goods were worth. *Wulf & Billing v. Wulf, Q. B., 756.*

See PROOF BY SURETY.

TRADE NAME.

A manufacturer who has produced an article of merchandise [*e. g.* a new pattern of cloth] and applied to it a particular fancy name, and sold it with a particular name under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. The use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that the purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for

entitled to compensation in damages, and relief by injunction. *Hirst v. Den-*
C. B., 542.

FER.—See CUSTOM OF STOCK EXCHANGE.

OF BILLS OF LADING.

merchants in California agreed to send cargoes of wheat to a miller in En-
reimbursement to be by his acceptance against bill of lading. The corn
shipped a cargo, and made out the bill of lading in six parts. Three parts
responding bills of exchange drawn on the miller for the price of the cargo,
indorsed by the corn merchants, and transferred to a Californian bank for valu-
consideration. These bills of exchange were, with the bills of lading annexed,
by the miller. One indorsed part of the bill of lading was inadvertently
the corn dealers to the miller, and by him transferred to an English bank for
consideration. The bills of exchange were not met by the miller:—

that the corn merchants were entitled to deal as they did with the cargo by
ring the bills of lading; that the English bank could not, under the circum-
claim as holders of the bill of lading without notice, and that the English
had no priority.

re, whether the miller might not have refused to accept the bills of exchange
the bills of lading were delivered to him.

see of the Master of the Rolls affirmed. *Gilbert v. Guignon*, L. C., 16.

ASSER.—See ADJOINING COAL MINES.

ES.—See INVESTMENT BY TRUSTEES.

OF TRADE.—See SHIP OR SHIP'S POLICY.

—See APPOINTMENT BY WILL; LEGACY CHARGED AS A DEBT.

SELECTED DIGEST OF STATE REPORTS.

[For this number of the Review selections have been made from the following State Reports: 10 Bush, (Kentucky); 21 Grattan, (Virginia); 85 Indiana; 106 Massachusetts; 16 Minnesota; 46 North Carolina; and 68 Pennsylvania.]

ACCORD AND SATISFACTION.

The principle is too well established and too long acquiesced in to be doubted that an agreement by a creditor to receive a part in discharge of the whole due to him by a single bill, is without consideration, and therefore void. As a general rule, there are exceptions, as if: 1. A less sum is agreed upon and received on the day of payment. 2. Or at a different place. 3. Or money's worth is received. In such cases, a general composition is agreed upon. *McKenzie v. Culbreth*, 66 N. H.

ACCOUNT STATED.

Upon a complaint on an account stated by defendants as partners, for services performed by plaintiff, it is sufficient to show the partnership of defendants, the account stated by plaintiff for them as partners, and that an account therefor was agreed upon as alleged in the complaint. Under a general denial of such complaint, defendants cannot be permitted to attack the correctness of the items of which the account stated is composed. *Warner v. Myrick*, 16 Minn., 91.

ACTION.

1. The Minnesota Central University, a corporation, was indebted to the plaintiff in over \$800, which he had expressed his willingness to cancel for \$400, in satisfaction of a promise made by him to the friends of the University might choose. The defendant, at its next annual meeting, voted to raise \$3,300 in three equal annual installments, \$400 whereof to be paid in satisfaction of said account, and not to the plaintiff "of the acceptance of his proposition to receive \$400 in full for his debt, and that they would pay it in three annual installments, to which the plaintiff assented." The defendant thereafter proceeded during three years next ensuing to collect money from various Baptist churches and individuals, for its general expenses, among which was the payment of said \$400, to an amount exceeding \$1,100 per year, by voluntary subscriptions and contributions, mostly at public meetings.

Held, that the defendant was not liable to the plaintiff in an action for money received, for said 400, or any part thereof. That whether or not it be based on a promise made by A. to B., for the benefit of C., an action lies for C against B. is not applicable to this case, for the donations were voluntary—the defendant gratuitous—the plaintiff's agreement *nudum pactum*—being simply to accept the sum in full of an ascertained debt to a larger amount, and the undertaking of the defendant, upon which the moneys were contributed, being deemed, in law, to have been made for the benefit of the University, not the plaintiff. *Van Hoesen v. Bap. State Convention*, 16 Minn., 96.

2. In an action based upon a contract of loan of money between plaintiff and defendant, it is not material whether a prior agreement between the plaintiff and a third person under which the money loaned to the defendant was paid to the plaintiff as a part of its consideration, is against public policy or not. *Winterson v. Winterson*, 16 Minn., 468.

The defendant may, after judgment, by appropriate suit, assert any cause of action which he has had against the plaintiff, notwithstanding the fact, that he might have asserted such cause of action as a set-off or counter-claim to prevent the recovery against him, but failed to do so. *Emmerson's Admr. v. Herriford*, 8 Bush., 229. A Confederate officer may maintain an action, for the value of the use of his horse, against a party who acquired and held possession thereof during and after the war, through the form of a purchase under an illegal judgment. *L. & N. R. Co. v. Buckner*, *Ib.*, 277.

The holder of an unaccepted check on bankers may maintain an action against the bankers for non-payment on presentation and demand, it being made to appear that the holder had sufficient deposit to pay the check at the time it was drawn, and notice was given to the bankers that it was drawn upon funds in their hands belonging to the drawer. *Lester & Co. v. Given, Jones & Co.*, *Ib.*, 357.

Money fraudulently recovered by judgment, and paid after being replevied, can be recovered in equity without awarding a new trial of the common law action, or setting aside judgment therein. *Edis v. Kelly*, *Ib.*, 621.

When a party by some act or declaration out of the record lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, the judgment or decree thus obtained is fraudulent, and may be impeached on that ground. *Ib.*

A demand of possession must be made of a tenant, or quasi tenant, before an action for the recovery of the land can be maintained. But this doctrine does not apply where the party in possession claims the fee, and there was no contract, express or implied, between him and the claimant. *Sale v. Crutchfield, &c.*, *Ib.*, 636.

One cannot maintain an action for a wrong done him in common with other members of the community (the remedy being by a public prosecution), but he may recover any special damage done to himself.

In this case the complaint alleged that plaintiff was carrying on a tannery at a place on the Wolf River; that during May, June and July, 1867, he was obliged to procure the bark necessary for said tannery at a point sixty miles from the stream, and that was the only place and mode he had for obtaining bark, and that defendant totally obstructed the river with logs, etc., for six weeks from the first of June in that year, and thus wholly prevented plaintiff during that time from getting the bark necessary for his tannery, and delayed him in the manufacture of leather at least four weeks, during which time the price of bark fell a specified amount, and also compelled him to keep his employees in idleness, at great expense to himself, etc., etc.

It was held, that a good cause of action for special damages was stated. *Enos v. Hamilton*, 27 Wis., 156.

The owner of personal property can not take it by violence from the peaceable, lawful, and wrongful, possession of another. *Huppert v. Morrison*, *Ib.*, 365.

A conspiracy to obtain from a master mechanic, whose business requires the employment of workmen, money which he is under no legal liability to pay, by inducing him to threaten to induce workmen to leave his employment, and deterring or threatening to deter others from entering it, so as to render him reasonably apprehensive that he cannot carry on business without making the payment, is illegal, and in an action of tort he may recover the sum so paid, and damages for the injury of his business by the acts of the conspirators; but whether he can recover back the sum paid in an action of contract, as money had and received to his use, *quære*: *Carew v. Hetherford*, 1, 106 Mass.

12. By maintaining a building with a roof constructed so that snow and ice falling on it from natural causes will naturally and probably fall into the highway, the owner of the building is liable, without other proof of negligence, for the injury to a person injured by such a fall upon him while traveling on the highway with a vehicle, and it is immaterial that all the rooms in the building are occupied by tenants. *Shibley v. Fifty Associates, Ib.*, 194.

ACTS OF ASSEMBLY.

1. The Legislature may direct the time for paying damages assessed for property for public use. *Haley v. Philadelphia*, 45, Penn., 68.

2. Where the words and intention of an act are so plain that a court has appealed to to declare their meaning, the Legislature cannot, by a retrospective act, put a construction on them contrary to their true intent and meaning. *Ib.*

ACTUS DEL.

1. A carrier must use reasonable expedition, but is not bound to use extraordinary exertions or extra expense to surmount obstacles not caused by his own default, the weather, or other act of Providence. *Empire Co. v. Wallace*, 302, 68 N. Y., 100.

2. The established route of a carrier was by rail to Philadelphia, and by water to Boston. He was not bound to send goods by rail from Philadelphia when there was an obstruction in the water communication. *Ib.*

ADMINISTRATION.

1. Final settlement of executors, administrators and guardians, when regularly proved, have the force of judgments, and can only be attacked by fraud; fraud may be positive and actual, with intent to cheat and wrong those interested, or it may consist in any improper act or concealment which operates as a fraud and results in loss, whatever the motive. *Clyce v. Anderson, ex'r, etc.*, 37, 49, Mo.

2. Executors and administrators are not to be charged with interest upon the inventory and sale bill of the trust estate, as of course. Where interest has actually collected, it is matter of discretion with the Probate Court whether to charge those officers with it or not; and in proceedings to set aside final settlement on the ground of fraud, this Court will not review such discretionary action of the Probate Court. *Ib.*

3. Joinder as Defendants.—The administrator *de bonis non*, and not the executor, is the proper person to pursue the estate. But this principle cannot authorize the joinder of the executor and administrator as defendants in a proceeding to set aside their several settlements on the ground of fraud. If the action be well grounded, the judgment should be to set aside the settlement, in whole or in part, and order a new one. But neither in setting aside the old settlement nor making the new one, can any judgment be rendered against the administrator *de bonis non*. So far as a proceeding to set aside their settlements on the ground of fraud is concerned, their accounts are separate and independent, and there is no reason why they should not be joined. *Kerrin v. Roberson*, 252; *Ib.*

4. Payment of a note by a surety extinguishes the note and gives him the right of action for the money paid. His right of action accrues from the date of the payment and the statute of limitations under the administration law commences running from that time. *Burton v. Rutherford, adm'r, etc.*, 255; *Ib.*

ADMINISTRATORS AND EXECUTORS.

1. Where a father is indebted to his children, and gives them property at their maturity or marriage, the presumption is that this is a payment of the debt and not an advancement. This presumption, however, is liable to be rebutted by facts in the case. *Haglar v. McCombs*, 345, 66, N. C.

If money is given to a son-in-law, under similar circumstances, or paid by the son-in-law, as surety, the same rule applies. *Ib.*

If a father, while acting as executor, receives into his possession a number of slaves bequeathed to his children, and afterwards sells one of them, and retains and controls the others until their emancipation:—

Held, that in an action for the hire of said slaves, etc., it shall be determined, as a matter of fact, whether he converted, or intended to convert, the slaves to his own use, or whether he held them as trustee or bailee for his children. If the former, a debt is established, and the presumption above referred to applies—otherwise it does not. *Ib.*

A trustee is generally entitled to commissions, but when a person is a trustee by reason of his being executor, and voluntarily assumes control of a fund willed to his children, he not being their guardian, he is not entitled to commissions. *Ib.*

A father is bound to support his children if he has ability to do so, whether they have property or not, and he is not entitled to any credit for such support, in a settlement of accounts between them and himself. *Ib.*

In an action for an account, against an executor, the personal representative, and the children of a deceased legatee, should be made a party. *Ib.*

The rights of an administrator, *de bonis non*, relate to the death of the intestate, and he is bound only by such lawful acts of the previous administrator as were done in the due course of administration; for any *devastavit* on the part of the former administrator, the administrator *de bonis non* ought to recover the value of the goods wasted, in an action on the bond of his predecessor; but where the sureties on the bond are solvent, such action would be unavailing, and therefore unnecessary. It is the duty of the administrator, *de bonis non*, to complete the administration of the estate by collecting the unadministered assets, applying them in payment of debts, and when there are no personal effects, to obtain license to sell the real estate. *Badger v. Jones*, 305.

Where an administrator sold land of his intestate for the payment of debts, and previous to the sale an agreement was made between him and the creditor of the intestate, "that if he would buy the land he should have credit on certain claims and debts over which he had control, and which were due from the intestate, to the extent that he (the administrator) could pay *pro rata*," and the creditor on the faith of such agreement bought the land:—

Held, that in an action on the bond given for the purchase money, the defendant has a right to give in evidence the agreement, and was entitled to credit according to its terms: *Held, further*, that such agreement need not be reduced to writing, and that it was not contrary to the policy of the law. *Norton v. Edwards, Ib.*, 367.

If a simple contract creditor receives payment of the executor, a bond creditor is not afterwards, either at law or in equity, compelled the simple contract creditor to stand, for both are creditors, and the creditor first paid may, with good conscience, retain the money, and leave the bond creditor to his action as for a *devastavit*. Nor is this principle varied by the receipt of property in satisfaction instead of money; *provided*, the property is taken at a full price, *bona fide*, and without notice that the executor is contriving to defeat the priority of the bond creditor.

CASE:—The daughter of a decedent being very solicitous to cause his debts to be paid, on being assured by the executor that her own and his (the executor's) debts are the only ones outstanding, buys from the executor certain property, and executes her notes to certain persons, creditors of the executor, and it afterwards appears that the decedent owed other persons:—

Held, that these facts warrant a rescission of the transaction.

In the case thus stated, our Courts have refused to adopt the doctrine of the En-

glish Courts, by which a purchaser from a fiduciary is compelled to see to the cation of the purchase money,—had the purchase money been paid, the purchaser would have been protected in her title, but as the purchase money had not been paid, the fund will be arrested and applied in a due course of administration. *Walker, per rep., v. Pierce, 4 Nash, Ib., 590.*

ADMISSIONS.

The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties in the bond, though he is dead, and therefore not a party to the suit. *Walker, per rep., v. Pierce, 4 Nash, 722.*

ADVANCEMENT.

A testatrix by her will gave her own property, and appointed other property in virtue of a power in her deceased husband's will, equally among her children. It was directed that no child should be charged with any money advanced on its account, unless the same was charged in a memorandum filed with her will; and accordingly each of her children from all debts due her or her husband's estate unless charged in such memorandum. After making the will, she gave a sum to one of her daughters, who signed a receipt therefor, stating that it was to be deducted out of the estate of her father which was coming to her. This receipt was deposited by the testatrix in a trunk devoted exclusively to papers concerning the estate of the testatrix (including her will), and her husband's estate, but was otherwise connected with the will.

Held, that the receipt was not such a memorandum as was contemplated by the will, and the sum advanced was not to be deducted from the daughter's share. *Lowell v. Blake, 106 Mass., 592.*

ADVERSE POSSESSION.

1. When one in possession of a tract of land conveys the same in trust for the payment of debts, and afterwards the said land is sold at execution sale, and bought by the benefit of the bargainor's wife, and the said bargainor remains in possession of the land during his life-time, and the wife continues the same to the bringing of an action on the trust:—

Held, that such possession is not adverse to the trustee, nor to the purchaser at the sale under said deed of trust. *McNeil v. Riddle, 66 N. C., 290.*

2. Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale, for valuable consideration, and without notice of the illegality of the consideration of the said debts:—

Held, that his title is not affected thereby. *Ib.*

3. If a deed contain a declaration of trust in favor of several creditors, and the debts secured is feigned or usurious, and there be no combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust in favor of the true debts may not stand, and the feigned debt be treated as nullity. *Ib.*

AGENCY.

In a suit by a county on a bond given the County Court for money loaned, a defense will be a good one which charges that one of the county justices, acting as agent for the county, procured the signature of defendant as surety by fraudulent misrepresentations. If the justice assumed to act as agent, and his acts were

by the Court, such approval is a sufficient ratification of his agency; and his fraudulent conduct may both be shown in evidence.

Where, however, the principal on the bond, without the knowledge of the creditor, procures the signature of the surety by such fraud, the latter will not be released, but may seek his remedy against the principal: *Gasconade County, to use, etc., v. Sanders*, 10 Mo., 192.

In the employment of agents, counties have not even the powers conferred on municipal corporations. They are merely *quasi* corporations, political divisions of the State, and they act in subordination to, and as auxiliary to, the State government: *County, to use, etc., v. Bentley, Ib.*, 236.

Where the by-laws of an insurance company gave the general agent, under the sanction of the executive committee, authority to compromise and settle claims, and it appears that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, which drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose, and the company would be bound for the payment of such drafts: *Fayles v. Nat. Ins. Co., Ib.*, 380.

A sale of land made by an agent on different terms from those directed by his principal, will not bind the latter, although more advantageous than those called for by their contract. But a ratification by the principal of an agreement to sell the land on different terms is equivalent to a prior authority; and the principal will be bound for the amount of commissions agreed upon. And he can not relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disavowal of him from performance: *Nesbitt v. Helser, Ib.*, 383.

If goods are sold to a party, on the representation of one professing to be his agent, and are afterwards delivered to such party and invoiced to him, and the invoice is honored and the goods are used by him, he is bound for their value, and under such circumstances it is immaterial whether the person professing to be agent was such or not.

In order to avoid such responsibility, the party to whom the goods were sent must not have, on the receipt of the invoice, promptly refused to receive—otherwise, he gives consent under the maxim *qui tacet clamat*: *Miller v. The Land and Lumber Co.*, 66 N. C., 503.

The invoice was notice that the credit was given to such party: *Ib.*

In such case it is immaterial that the officers of such party (a corporation) did not intend to induce the seller to believe that the corporation had bought and would pay for the goods, or that they would not have kept the goods if they had not known that the corporation was bound to pay the seller for them. The rule is, that when a person, by his conduct, unintentionally, gives another reasonable ground to believe that a certain state of facts exists and the other acts on the belief so induced, that he will be estopped if it is not true, the person so inducing is estopped as to the other, after he attempts to deny the existence of such a state of facts: *Ib.*

The retention of the goods and silence, after receipt of invoice, furnished reasonable ground to cause the sellers to believe that the corporation ratified the sale, and they naturally have prevented them from taking such action as they otherwise would have taken for their security: *Ib.*

J. L., the defendant, who was authorized by J. & Co., to sell or exchange a pair of horses belonging to them, exchanged them with S. & Co., the plaintiffs, for a pair of horses belonging to them, and for the agreed difference in value between the two, gave S. & Co. a promissory note as follows:

Ninety days after date, for value received, we promise to pay to the order of S. & Co. the sum of two hundred dollars.

CHARIBAUT, April 3d, 1868.

J. & Co., per J. L."

Defendant had no authority to give the note of J. & Co., but plaintiffs supposed he had.

Held, that the defendant was not liable on the note; that plaintiffs' remedy was an action in the nature of an action on the case against defendant for damages, falsely assuming authority to act as agent; but that if J. & Co., afterwards, knew all the facts, ratified the act of the defendant, then such action could not be maintained against him, except where suit was commenced, or injury had resulted to plaintiffs from defendant's act before ratification, or where the effect of making the ratification relate back, would be to put plaintiffs in a worse position than they would otherwise have been in consequence of such unauthorized act: *Sheffield et al. vs. Ladd*, Minn., 388.

10. As the validity of a ratification does not in general depend upon its being communicated, the defendant's failure to notify plaintiffs of the ratification would not make him liable, without showing facts imposing a duty on him to give such notice and damage resulting from his neglect: *Ib.*

ALIMONY.

Where a wife is compelled to seek a divorce from her husband, on account of his misconduct, in fixing the amount of alimony, the earnings of the husband must be taken into the account, if necessary, as well as his property: *Bailey v. Bailey*, 21 Kan., 43.

ALTERATION OF WRITING.

1. If an alteration or mutilation is made in or of a note, by which the legal or equitable rights of the parties are affected, and the alteration or mutilation is made by the act of the holder, and was intentional on his part, it invalidates the paper.

When the fact of the alteration or mutilation is established, and the proof does not disclose how, by whom, or when it was done, the holder must suffer, as the burden of proof is upon the party in the possession of the paper, and attempting to enforce payment, to show how the alteration or mutilation occurred; and upon his failing to do so, no recovery can be had upon it.

The name of one of the obligors to the note in this case, was torn off. The obligor should never have received such paper without having some evidence of the cause of its mutilation: *Elbert v. McClelland, &c.*, 8 Bush, 577.

2. If the alteration is material, the burden of proof is still upon the holder to explain it, although the alteration may be against his interest: *Ib.*

3. As the question is *mutilation or no mutilation*, the fact of the mutilation against the interest of the holder, would be a circumstance to be considered by the jury as to whether a mutilation had been made or not.

But when the fact of mutilation is established, affecting the rights of the holder, the explanation as to when and how it was done is with the holder: *Pars. Notes and Bills*, 579.) *Ib.*

4. F. agreed to lend \$4,000 to S., at 12 per cent. interest, S. paying \$240 in advance. S. delivered to F. a note signed by himself and others as his sureties. Afterwards, discovering that nothing appeared in the note about interest, told S., who directed him to insert that it was with interest. F. did so in S's presence. This avoided the claim as to the sureties: *Fulmer v. Seitz*, 68 Penn., 237.

5. F. sued for the note, principal and interest.

Held, that the refusal to allow him at the trial to strike out the addition of interest was proper: *Ib.*

AMNESTY.

1. After the rehabilitation of the State, parties who had been arrested as re-

cripts had a right of action against their captors. But such causes of action have been destroyed by virtue of the Amnesty Act of 1866: *Franklin v. Vannoy*, 66 N. C.,

The seizure of the property of a recusant conscript, at the time of his arrest, is a collateral incident to the arrest, and the cause of action therefor follows the fate of the principal cause, and is likewise embraced by that act: *Ib.*

During the late rebellion, the Confederate States, and the States composing it, acted, to all intents and purposes, governments *de facto*, with reference to citizens who continued to reside within the Confederate lines. Hence, the Constitution of the Confederate States, and the acts of its Congress, and the constitution of the State as then existing, and the acts of its Legislature, constituted, during the continuance of the rebellion, the law of the land. The scope and effect of the Amnesty Act was to recognize this principle. That act is not only constitutional, but a wise, beneficent and remedial statute, and should be liberally construed, on the maxim, *privatum incommo- publico bono pensatur*: *Ib.*

APPELLATE COURT.

If a case is tried, and a verdict for the plaintiff is rendered, and the court sets aside the verdict and grants a new trial, and on the second trial there is a verdict and judgment for the defendant, from which there is an appeal, the appellate court will reverse the proceedings on both trials; and if the court below erred in setting aside the verdict on the first trial, the appellate court, without considering the subsequent proceedings in the case, will reverse the judgment rendered for the defendant on the second trial, and enter final judgment upon the first verdict: *Tyler v. Taylor*, 21 Gratt., 700.

In a suit in equity, the defendant insists there are other persons who ought to be parties, but the court decrees against him on the merits. On appeal, the appellate court will reverse the decree for the failure to make the necessary parties, without reversing on the merits: *Richardson v. Davis and wife*, *Ib.*, 706.

ASSIGNEE.

An assignee, a member of a private banking firm, deposited the trust funds with his firm in his name as assignee, distinct from his own. The firm sometimes paid interest on deposits—he received no interest for this deposit.

Held, under the circumstances, he was not chargeable with interest: *Hess's Estate*, 106 Penn., 454.

ASSIGNMENT.

A testatrix bequeathed an annuity, and directed that no part of the bequest, while remaining in the hands of her executor, should ever be liable for any of the debts of the annuitant. He assigned the annuity, and directed the executor to pay it to the assignee as it became due.

Held, that no action, on behalf of the annuitant, lay against the executor on his refusal, for paying the annuity to the assignee, so long as the assignment was not rescinded, even though it was voidable: *Ames v. Clarke*, 106 Mass., 573.

ASSIGNOR AND ASSIGNEE.

The assignment of a note is of itself, a contract by which the party making the assignment assumes certain liabilities, to be regulated and determined by the law of the place where the assignment is made: *Hyatt v. Bank of Kentucky*, 8 Bush, 193.

As between the maker and payee of a note executed and payable in the State of Louisiana, the legal effect of the note must be determined by the law of that State in which it is regarded as commercial paper, having the legal character of a bill of exchange: *Ib.*

3. But, as between the assignor and assignee of a note executed and payable in Louisiana, on an assignment made in Kentucky, where it is a simple promissory note, the legal effect of the assignment must be determined by the law of Kentucky; and consequently to make the assignor liable on his assignment the assignee must use diligence, etc.: *Ib.*

4. A note executed and payable in Louisiana was indorsed by the payee, and counted before its maturity, in a bank in Kentucky. The bank sued and sought to make the assignor of the note liable as for an indorsement of a bill of exchange.

Held, that although the assignor may have known that the legal character attached to the paper in Louisiana was that of a bill of exchange, this court will not, on a mere presumption, alter his liability upon a contract made and fixed by the law of Kentucky, the place where the assignment was made. The paper indorsed by the assignor being a mere promissory note in Kentucky, he is not liable as the indorser of a bill: *Ib.*

ATTACHMENT.

Notice of a sale under attachment, given merely by hand-bills, in a county where a newspaper is published, is in law no notice at all. Where a stranger purchases a good and adequate consideration, in ignorance of this irregularity, and receives the deed good upon its face, the sale should be received as valid, notwithstanding the Sheriff's neglect in regard to the notice, and such a sale might sustain a link in the chain of title, even if the purchase were made by the execution—plaintiff, innocent of his innocent grantees. But it can not be held to give him such an interest as to entitle him to relief in equity: *Curd v. Lackland*, 49 Mo., 451.

ATTORNEY.

Suit to recover for services rendered as an attorney. Upon the trial, the Court gave the following instruction:

"Where there is a general employment, for an agreed sum, of an attorney, and the employment extends until the final termination of the case in the Court of last resort, and no additional sum can be charged for services rendered, unless there is an express agreement to pay for the same."

Held, that this instruction was erroneous: *Bartholomew v. Langsdale*, 35 Ind.

2. An answer to a rule on an attorney of the Court to show cause why, under a writ of contempt, he should not pay into Court a sum of money received by him from his client, which admits the receipt and non-payment, but denies any application of it to his own use, which avers its loss; but in consequence of long continued drunkenness, respondent could not tell how, suggesting as a supposition, that respondent burnt it or put it away in some secret place to prevent its destruction of it, and avowing an inability to find it after diligent search.

Held, to be insufficient, and to authorize a further rule on respondent to pay the money into Court, or show cause why he should not be attached. But a return to such second rule, which avows, that after making every effort to comply with the rule, it is out of respondent's power to do so; that he is wholly insolvent, has no property wherewith to support himself and family; could obtain no aid from his friends or relations, and has no credit; and that in failing to perform the order, he intends no contempt of Court, and deeply regretted his inability to do justice to his client. *Held*, to be sufficient, and entitled the respondent to be relieved from arrest and imprisonment, because the Court was satisfied that it was not in his power to pay the money into Court: *Kane v. Haywood*, 66, N. C., 1.

3. If a party is ordered to execute a deed and refuses to do it, he will be kept in jail until he does do it, for that is a thing which he can do. So, if an attorney, by false representations, procures his client for an inadequate consideration, to

cause of action, he will be imprisoned until he shall execute a release and re-assignment; but when a man is ordered to pay money into Court, and swears that after any effort, it is out of his power to pay any part of it, (in the absence of any suggestion to the contrary,) that is an end of the proceeding; for the Court will not require an impossibility, or imprison a man perpetually for a debt, he having purged himself of the contempt: *Ib.*

The charter of the city of St. Louis, approved March 4, 1870, provided that Mayor and City Council should have power to license "auctioneers, grocers, merchants, retailers, hotels, * * * hackney carriages, omnibuses, carts, and other vehicles, and all other business, trades, avocations or professions whatever." The profession of "law" was not specifically enumerated in the section. *Held*, that under said provision the City Council of St. Louis had no power to pass an ordinance levying a tax on attorneys at law. The rule is, where general words follow particular ones, to construe them as applicable only to persons or things of the same general character or class. And in the case mentioned, the profession of law was not *ejusdem generis*, and could not be embraced in the purview of the act. *City of St. Louis v. Laughlin*, 49 Mo., 559.

AUCTIONEERS.

1. An auctioneer selling real estate at auction is the agent of both vendor and purchaser, and his writing, at the time, the name of the purchaser, as such, to the written terms of sale, binds the purchaser. *Walker v. Herring*, 21 Grattan, 678.

2. *Quere*: If the auctioneer can bind the purchaser, at auction of real estate, by describing his name, to the terms of sale after the sale is completed, and it seems he cannot: *Ib.*

BANK.

1. If one obtains a bill from a finder, or a thief, or one who has fraudulently acquired it and obtains the money, he is liable to the real owner for the money, unless he took for value in the usual course of business. And the fact that the holder is a banker doing a very large business, does not change the rule: *Kuhns v. Citysburg Bank*, 68 Penn., 445.

BANKRUPTCY.

1. A State Court having the right to enforce a lien, has power to decree distribution, and the assignee in bankruptcy must come into such Court to claim preference on the fund. *Biddle's Appeal*, 68 Penn., 13.

2. The District Courts of the United States have general original jurisdiction in all matters appertaining to the estate of a bankrupt; and they may exercise extra-territorial jurisdiction, in collecting the estate and adjusting the claims of the creditors of the bankrupt, when the Court of Bankruptcy can fairly and fully determine the rights of the parties interested. In all matters of controversy, when the subjects in dispute are of a local character, the rights of the parties must be determined in the local Courts. When a mortgagee, by the terms of the mortgage, has a right to foreclose, when an adjudication in bankruptcy is made, this right can not be administered by a District Court, sitting as a Court of Bankruptcy in another State. The State Courts can afford a remedy by foreclosure or sale, and at the same time, allow the assignee to have the full benefit of the equity of redemption: *Whitridge v. Taylor*, 66 N. C., 273.

BANKS.

Under the power reserved in the charter of a private corporation, to repeal, alter or modify the charter, the Legislature may repeal the charter, but can not

modify it without the consent of the corporation. But if the corporation to consent to the modification, it must discontinue its business as a corporation. *Yeaton v. Bank of the Old Dominion*, 21 Grattan, 593.

BANK CHECKS.

B. gives A. a check on a bank, which A. holds up for a year, and then presents it, but the bank refuses to pay it, B. having drawn out all his money. A. is not relieved from the payment of the check by the delay of A. to present it, and in any case he would only be relieved to the extent that he was injured by the delay: *Bell v. Alexander*, 21 Grattan, 1.

BAR.

A final decree in equity until set aside on appeal, is a bar to a suit for the same subject matter, whether the suit be instituted before or after the effect of the decree is the same whether offered in evidence or pleaded: *cott v. Edmunds*, 68 Penn., 34.

BIGAMY.

On a prosecution for bigamy where a marriage is alleged to have taken place in a foreign country or State, proof must be made of a valid marriage, according to the law of that country or State; but no particular kind of evidence is essential to establish the fact, except that it can not be proved by reputation or co-habitation: *Bird's Case*, 21 Grattan, 800.

BILLS AND NOTES.

1. "Presentation and protest waived" being inserted in the body of a bill of exchange, the waiver affects and forms a part of the contract of the indorser as well as the drawer, and is binding upon the indorser according to the tenor and effect of the bill: *Bryant v. Merchants Bank of Ky.*, 8 Bush., 43.

2. The notary is required to give or send the notices of the dishonor of the bill to the parties sought to be held liable, when he knows their place of residence. It is not required to use ordinary diligence to ascertain the place of residence of the parties sought to be held liable by the protest and notice. And he is a competent witness to prove that he did not at the time of the protest know the place of residence of the parties to the bill: *Mulholland & Bros. v. Samuels*, *Ib.*, 63.

3. "If not paid, I request indulgence." This indorsement on a promissory note made by the obligor at or about the time the note was executed, was no such request as would estop the obligor from pleading the statute.

A mere request made for indulgence, either verbally or in writing, twenty years before the institution of the suit, is no reason for forbearance for such a length of time, and can not be relied on by the obligees as having been made to lull them into inactivity, in order that the statute might be successfully pleaded.

Evidence that such a request was the cause of indulgence was incompetent: *Executor v. Robinson & Dudley*, *Ib.*, 269.

4. A check is an absolute appropriation of so much money in the hands of the banker to the holder of the check, to remain there until called for, and can not be withdrawn by the drawer: *Lester & Co. v. Given, Jones & Co.*, *Ib.*, 357.

5. The distinguishing characteristics between a check and an ordinary bill of exchange, are fully set forth in the opinion in this case: *Ib.*

6. A bill of exchange or promissory note taken after the date of payment, when it is overdue, subjects the holder to all the equities attaching to it in the hands of the party from whom he received it; otherwise with a check: *Ib.*

7. No one can accept a bill to whom it is not addressed, and if it is accepted by one who is not liable: *Smith, & Co. v. Lockridge*, *Ib.*, 423.

A note made payable to "the Superintendent of the Decatur Agricultural Ex-
hibitions," may be sued on by the payee in his own name, describing himself as such
superintendent: *Durfee v. Morris*, 49 Mo., 55.

DS.

A joint and several bond of indemnity for selling under an execution was given
to the sheriff; it was not executed by the principal. A recovery could be had against
one of a number of sureties who signed the bond. When the defendant signed, the
names of all the co-obligors mentioned in the bond were to it, the name of one of
them having been put there without his authority. The others were liable notwith-
standing. In such case there is no implied condition that all named as obligors should
make it binding on any. If either signer wishes to protect himself, he should
insert it as an *averment*: *Loew v. Stocker*, 68 Penn., 226.

A. entered into a contract with B., by the terms of which A. agreed to deliver to
B. 100 grain and seed drills of a particular pattern, within a specified time. The full
contract price of the drills was \$1,600, and A. was to be at the whole expense of get-
ting them up. As an indemnity, and to guarantee the faithful performance of the
contract, he executed and delivered a bond in the sum of \$1,600, conditioned that he
should fully comply with the agreement.

Held, that the amount named in the bond should be treated as a penalty, and not as
liquidated damages: *Hamaker, adm'r, v. Schroers*, 49 Mo., 406.

PROMISE OF MARRIAGE.

In an action by a woman for breach of a promise of marriage, it is no defense
that the defendant was married at the time of the promise, if the plaintiff was ignorant
thereof: *Kelley v. Riley*, 106 Mass., 339.

In an action by a woman for breach of a promise of marriage, evidence that she
was seduced by the defendant under promise of marriage is admissible on the ques-
tion of damages: *Ib.*

IDGE.

Without the duty to repair a highway, no liability rests upon the municipality
for latent defects: *Ropho v. Moore*, 68 Penn., 404.

As a general proposition (not universal) bridges are treated as portions of the
highway, and are to be maintained by the same persons as the highways: *Ib.*

A municipality, though bound to the duty of maintenance and repair, is not
absolutely bound for the soundness of the structures it erects as part of the high-
way: *Ib.*

Where the defect in a lawful structure is latent, or is the work of a wrong-doer,
no express notice of it must be brought home to the corporation, or the defect
must be so notorious as to be evident to all passers, when the corporation is charged
with constructive notice: *Ib.*

When a bridge has stood for the time timbers are expected to last, and it may
be reasonably expected that decay has set in, it is negligence to omit all proper pre-
cautions to ascertain its condition: *Ib.*

In such case appearances will not excuse the neglect, but it is the duty of the
superintendents to call to their assistance those whose skill will enable them to ascertain
the state of the structure: *Ib.*

OKER.

A broker has earned his commission when he procures a party with whom his
principal is satisfied, and who actually contracts for the property at a price satisfac-
tory to the owner. He must establish his employment either by previous authority,

or by the acceptance of his agency and adoption of his acts, and that the agent was not the procuring cause of the sale: *Keys v. Johnson*, 68 Penn., 42.

CARRIERS.

1. Owners of a steamboat are liable for an assault upon a passenger by the clerk of the boat.

A boy about fifteen years of age, while a deck passenger on the steamer Franklin, plying between Louisville and Cincinnati, was assaulted and stricken by the third clerk of the boat, and, among other injuries received, one of his eyes was totally destroyed. The jury returned a verdict, and the court rendered a judgment against the owners of the boat for forty-four hundred dollars, as compensation for the injury. Judgment affirmed: *Sherley v. Billings*, 8 Bush, 147.

2. Common carriers of passengers are held to the strictest responsibility for vigilance and skill, on the part of themselves and those employed by them. They are required to behave toward their passengers with civility and propriety, to have servants and agents competent for their several employments; and for the negligence of their servants or agents in any of the above particulars, or generally in the discharge of their points of duty, the carrier is directly responsible: *Ib.*

3. The carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but a *fortiori* against the violence and insults of his servants: *Ib.*

4. A gold watch deposited in his trunk by a traveler on a railroad, is held to be baggage, for which the carrier is responsible: *American Contract Company v. Railroad Co.*, 472.

CARRIER OF GOODS.

1. When goods are shipped to a consignee, over a railway, the shipper cannot compel the carrier, by notice to the carrier, to stop the goods at an intermediate point: *American Contract Company v. Railroad Co.*, 472.

2. Whether an agent of such carrier may not bind his principal by an express contract to hold the goods *quere*, but such contract must, at least, be an express contract.

3. Where tobacco was shipped from Thomasville via Charlotte, and consigned to a party in Columbia, and was sent off from Charlotte by rail to Columbia, according to the bill of lading, and the tobacco was received by the consignee in Columbia, and the express contract to hold at Charlotte was shown, the measure of the shipper's loss is the cost to send it back, or what it would have cost to send it back, and compensation for the delay: *Ib.*

CARRIERS OF PASSENGERS.

1. The policy of the law requires common carriers to use a high degree of care in transporting passengers, to guard against probable injury. It is their duty to stop and place their passengers safely at the point of destination, and if injury to a passenger ensues from a failure to observe due care, the carrier is *prima facie* liable: *Lambeth v. N. C. R. R. Co.*, 66 N. C., 494.

2. Where a passenger jumped off of a railroad train, while running at a speed of from two to four miles an hour, and this was the proximate cause of the injury complained of, and contributory negligence is alleged, the true criterion of the negligence required from the passenger is that degree which may have been reasonably expected of a sensible person in such situation: *Ib.*

3. A passenger on a railroad train had a right to expect that the carrier employed a skillful and prudent conductor, who had experience and knowledge of the business sufficient to correctly advise and direct him as to the proper time and place of alighting from the train: *Ib.*

Where, when the usual signal was given for slackening the speed of the train, the actor went with a passenger and his companion out on the platform to assist them in getting off safely, and such passenger, without any directions from the conductor, voluntarily increased danger by jumping off the train while in motion, the carrier is responsible for an injury resulting therefrom; but if the motion of the train was such that the danger of jumping off would not be apparent to a reasonable person, the passenger acted under the instructions of the conductor, then the defense of contributory negligence would be unavailing: *Ib.*

AGREED.

On the question of an alteration of the bond sued on, if the case agreed does state the alteration was made after the execution of the bond, the court, in procuring the conclusion of law upon the facts, can not assume that such was the fact: *Myers' adm'r's v. McCue et al.*, 21 Gratt., 349.

ARBITRABLE USES.

The residuary clause of a will was as follows: "Item. I give and bequeath the residue of my estate, after the foregoing bequests have been fully paid, to the orthodox protestant clergymen of Delphi, and their successors; to be expended in the education of orphaned children, both male and female, in such way and manner as they may deem proper, of which a majority of them may determine; my object in this bequest being to promote the moral and religious improvement and well-being of the colored race."

Whether an organized or corporate body known as the orthodox protestant clergymen of Delphi existed at the time of the execution of the will, or afterwards.

Held, that in a suit by heirs at law of the testator against his executors, that said residuary clause was void at law for vagueness and uncertainty, and incapable of judicial enforcement by a court of Chancery, possessing only the ordinary powers of a court of Equity, and therefore could not be sustained by the courts of this State: *Gaines' Ex'r's v. Harmon et al.*, 35 Ind., 198.

CONDITION PRECEDENT.

A condition on a note payable "six months after a ratification of a treaty of peace between the United States and the Confederate States," is premature and can not be sustained. The event constitutes a condition precedent, which has not and will not be performed: *McNinch v. Ramsay*, 66 N. C., 229.

CONFEDERATE CONTRACTS.

A contract made in Aug., 1863, for the sale of land, to be paid for in Confederate currency, is a valid contract: *Hale v. Wilkinson*, 21 Grattan, 75.

By the act of March 3d, 1866, and that of February 28th, 1867, two modes of enforcing Confederate contracts are provided; 1st. By reducing the nominal amount contracted to be paid to its gold value. 2d. In cases of sales of property, or renting property, giving the value of the property sold, or the value of the rent or hire, at the time of such sale, renting or hiring: *Pharris v. Dice*, *Ib.*, 330.

These acts do not change the contracts of the parties, but provide a mode of enforcing the value of the Confederate money contracted to be paid; and they are constitutional: *Ib.*

M. borrows of T., early in 1864, Confederate money, and executes his negotiable note, indorsed by D., for the amount, payable in ninety days at the Bank of Virginia. This note is renewed from time to time, until the 4th of January, 1865; M. proposes to pay off the note to T., but at the request of T., renews the note, upon the promise of T., that he will deposit the note in bank for collection; before the note falls due, M. deposits more than the amount of the note in the bank, where it remains until the bank fails. A few days before the note is due, the bank is burned out, the note not having been deposited in bank.

Held, M.'s offer to pay, he consenting to renew the note, and his deposit of money in bank, was neither a tender, or accord and satisfaction; and he was not bound to pay the amount due upon the note: *Moses v. Trice*, *Ib.*, 556.

5. In March, 1863, the fact that Confederate States' Treasury notes were a legal tender in currency in circulation in this State, is so notorious that it may be taken judicially by the courts, as a matter of current public history. And all sales made for the sale of property at as late a period of the war as 1863, and all sales made under such decrees, must be taken as made for this currency, unless the decree, in express terms, directed otherwise: *Walkers Ex'rs., et al v. Pa.* *Ib.*, 636.

6. That the courts of this commonwealth, during the war, had the authority to decree sales for Confederate money, and to make investments of funds under the control in Confederate securities, is no longer an open question. Transactions made for Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made at the time of peace in a sound currency: *Ib.*

CONFESSIONS.

The admission of guilt of one who had, prior to making such admission, been induced by fear or the hope of benefit, to confess himself guilty of a crime, charge, can not be used against him, unless it be shown by the most irrefragable evidence, that the motives which induced the first confession had ceased to operate. Hence, when a party had been persuaded to make a confession of guilt, on the promise of immunity from prosecution therefor: *Held*, that in the absence of proof that such inducement had ceased to operate, his confessions touching the same offense, thereafter made, were inadmissible: *State v. Lowhorne*, 66 N. C.

CONTRACTS.

1. Defendant signed a paper, by which the subscribers agreed to pay certain sums respectively, for the purpose of purchasing a certain quantity of lands to be sold from a certain described body of lands, at specified prices per acre; the contract of the subscription being declared in said paper to be, that if the lands should be found satisfactory to a committee to be appointed by the subscribers to examine them, the subscription should be binding, but not otherwise. Many of the other subscribers made their subscriptions, and the lands were selected by a committee duly appointed. On subsequent proceeding in equity, in which some of the subscribers were plaintiffs and the others defendants, the present plaintiff was appointed receiver to take possession of the property, choses in action, etc., belonging to the fund, with the powers of a receiver.

Held, that said subscription paper was a valid contract on the part of the subscribers thereof; that plaintiff, as such receiver, could maintain an action to recover from the defendant the amount unpaid on his subscription, if by any secret arrangement between defendant and the vendor of said lands the former was to be relieved from paying his subscription, and a correspondingly less sum than that stipulated to be paid, and was in part paid and accepted for the lands, such an arrangement was a fraud upon the other subscribers, and would be no defense to the action on the defendant's description: *Lathrop, receiver, v. Knapp*, 27 Wis., 214.

2. A. and B. were partners. They dissolved partnership, and B. executed a promissory note to A. that he would pay all the debts of the firm, and C. signed the note as surety for B.

Held, that the creditors of the firm were entitled to the benefit of the note, and that a creditor might maintain an action against B. and his surety, for the payment of his debt: *Dunlap v. McNeil*, 35 Ind., 316

. went with B.'s agent to see a lot of land which B. had for sale. The agent, y to A.'s inquiry, said that there were between 40,000 and 50,000 square feet. eed to buy the land at a certain price per foot, paid the agent a sum on account sale, and took a receipt therefor, which stated the terms of sale, but not the f the land. The land turned out to contain 66,000 square feet, and on that t A. refused to accept a deed.

, that he could not recover back the sum which he paid to the agent: *Dickinson v. Lee*, 106 Mass., 557.

The rule as to duress *per minas* has now a broader application than formerly. e one has the property of another in his power, so that he can exert his control to the prejudice of the other, a threat to use this control may enable the other id an obligation obtained without consideration, by means of the threats. But threats of injury to property, without power over it to enable the party to execute threats, are not duress *per minas*: *Miller v. Miller*, 68 Penn., 486.

A chancellor will refuse specific execution of a contract for a reason less than constitute duress *per minas*, or will set aside a bargain for extortion or undue nce on a weak mind or under circumstances of a confidential relation, but will t aside an agreement for duress *per minas* when the law would not: *Id.*

The expense or charge incurred in rebuilding a woolen mill is a sufficient con- tion to support a promise to pay the amount pledged for that object by the of a subscription paper, without proof of any other or special consideration. In ebuilding of an ordinary private establishment, this doctrine would not hold; woolen mill, especially in the West, is something more than this. In a variety ys it may be regarded as of benefit to the community at large, and to that extent lic enterprise: *Pitt v. Gentle*, 49 Mo., 74.

When the vendor of land claims to have rescinded, and repudiates and denies blication of the contract, placing himself in such a position that it appears that der were made its acceptance would be refused, then no tender need be made by endee. In such case, it is enough if the latter, in a suit for specific performance, by his bill to bring in the money when the amount is liquidated, and he has his e for performance: *Diechmann v. Diechmann*, 49 Mo., 107.

In an action on a covenant against encumbrances, for amount paid by plaintiff exes, defendant may prove that in addition to other considerations named in the plaintiff had made a parol agreement to pay off said taxes.

though in general all stipulations and declarations anterior to, and contempora- s with, a written agreement, are merged in it, and can not be proved by parol, it ther true that additional considerations not inconsistent with those named in a , may be proved by parol: *Landman v. Ingram*, 49 Mo., 212.

If one owing another on several distinct demands, fails to designate on what par- ar demand a payment is to be credited, the creditor may place it as a payment ny of the demands, at his pleasure. Thus, it would be no defense to suit on me- ics' lien that the contractor had paid money enough to plaintiff to satisfy the when it further appeared that the money had been paid on a general account aterials used in erecting various buildings, and that the plaintiff, in the absence irections from the contractor, had applied the payments to other buildings than whereon the lien had attached: *Waterman v. Younger*, *Id.*, 413.

D. A., who was an innkeeper, held the baggage of B. to satisfy a board bill. C., an innkeeper, agreed with A. to board B. for a certain time, in consideration of promise of A. to retain the baggage as security for the latter's bill. The baggage released without the payment of the bill. In suit for the amount thereof by C. nt A.,

Held, that although no benefit might be derived by A. from the agreement, injury received by C. from failure to perform it was a sufficient consideration to support the promise of A.; that the transaction might be considered as in the nature of a voluntary bailment, and of an agreement to enable B. to obtain credit; that in this case the consideration was sufficient; that A. was liable to C. for releasing the goods: *Hartzell v. Saunders, Ib., 433.*

CORPORATION.

1. After organization, the company may stipulate with subscribers to the company way mutually agreed on: *Nippenose Co. v. Staddon, 68 Penn., 256.*

2. Corporations are bound only by the acts and contracts of their officers authorized, within the scope of their authority: *Ib.*

COUNTY ORDERS.

1. Payment to the bearer by the County Treasurer of county orders, payable to a person named therein or bearer, when such payment is made in good faith and without knowledge of defect in the bearer's title, exonerates the county from liability on such orders, though such payment be made after the orders are dishonored: *County Commissioners Carver County, 16 Minn., 106.*

2. Notice of loss of such orders, to be effectual to save the rightful owner, should be brought home to the county treasurer: *Ib.*

COUNTY TREASURER.

Where one who had been County Treasurer, deposited money with the county board as security for any amount which might be found due from the county Treasurer, and afterwards brought suit for such moneys, alleging that there was a correct final settlement between him and the county, and there was no debt from him to the county: *Held, 1.* That the court might go behind the settlement, even after the lapse of six or seven years:

That upon satisfactory evidence of a mistake in such settlement, and that there was in fact a balance due from the plaintiff, judgment was properly rendered against him, notwithstanding an alleged loss of vouchers used upon such settlement. That he, notwithstanding he did not show what those vouchers were, and for what purposes the amounts named therein were paid: *Sexton v. Supervisors of Richland County, Wis., 349.*

CRIMINAL LAW.

1. It is the duty of a judge to be personally present in court, and to personally hear the facts upon which his conclusions are based. Judicial power is not delegated. Where, therefore, a judge is absent from the court, and the clerk discharges a jury, and the clerk so does: *Held, to be erroneous.* A prisoner, in such case, is entitled to his discharge: *State v. Jefferson, 66 N. H., 106.*

2. If one, by trick or contrivance, gets possession of the goods of another, and then act be done in such a way as to show a felonious intention to evade the law, he is guilty of larceny, as where one snatches money from the hands of a man, and immediately escapes to evade the process of law: *State v. Henderson, Ib., 627.*

DAMAGES.

1. Exemplary damages can not be recovered in an action for the recovery of goods and chattels, where there was no wrongful taking of the same: *Johnson v. Silly, 16 Minn., 320.*

2. Where there is a fraudulent warranty in the sale of a flock of sheep, the warranty being single, and relating to an infectious disease, the plaintiff is entitled to recover the whole loss occasioned by the presence of the disease among the sheep purchased, as well among those of the flock which took the infection after the sale.

at the fault of the plaintiff, as those which had it when the sale was made. He so recover such consequential damages as have resulted to another flock, owned at the time of the purchase, from such infectious disease communicated to it from the flock purchased, by reason of their being mingled together; the plaintiff being ignorant of the existence of the disease in the flock, purchased, and not being chargeable with want of ordinary care in the premises: *Marsh v. Webber*, 16 Minn., 418.

DEDICATION.

Selling lots bounded by streets is a parol dedication to the public by the owner of the right to use and enjoy the streets for all the purposes pertaining to such an interest. Such a dedication does not divest the owner of the right to the soil: *Weston v. Freking*, 8 Bush, 121.

Where land is sold bounded on a highway, or upon or along a highway, the center line of the same is presumed to be the limit and boundary of such sale, in strict analogy with the case of a stream of water not navigable; and the same applies to a private street, as well in the city as in the country, opened by the owner, upon which he sells house-lots bounding upon it: (See 2 Washburn on Real Estate, side-page, 638.) *Trustees of Hawesville v. Lander, etc.*, 8 Bush, 679.

COMPOSITION.

Composition in a suit in equity is admissible in a suit at law between the same parties on the same subject matter: *Winch v. James*, 68 Penn., 297.

TESTAMENTARY AND LEGACY.

A testator, by his will, gave to a woman whom he described himself as intending to marry, and whom he did marry soon afterwards, his dwelling-house and furniture, the residue of his sale of the house, then \$7,000 "to enable her to purchase a comfortable home;" and also gave her for life the income of \$10,000. The house was valued at \$5,000, and was subject to a mortgage to secure a note given by the testator for \$4,000. The testator also gave to an adopted son, besides some small specific bequests, "the income arising from the sum of \$10,000, to be expended by his guardian for his support and education during his minority, and the principal sum of \$10,000 at majority." He gave several other legacies, and made no residuary disposition of his estate. When he died, the assets were insufficient to pay the legacies. (1) That the legacy of the income of \$10,000 to the widow was to be preferred to all the other legacies, and was payable from the time of the testator's death. (2) That she was entitled to have the mortgage paid out of the personalty. (3) That the legacy of the income of \$10,000 to the son was next to be preferred to the other legacies, and was payable from the time of the testator's death. (4) That the legacy of the principal of \$10,000 to the son must abate in common with the other legacies: *Swasey*, 106 Mass., 100.

A testator, in making his will, gave a legacy to his sister, being partly induced by a desire to reward her for supporting their mother, as she had done and was still doing; and told her that she would be compensated, as he had provided for her in his will; there was nothing else to show any contract on the part of the testator, nor did she know the amount of the legacy.

That the legacy was not preferred, and if the assets were insufficient, must abate in common with other general legacies: *Ib.*

DISMISSAL.

Dismissal of a libel for a divorce for the cause of adultery, on the ground that adultery was not proved, is conclusive evidence, in subsequent proceedings for divorce between the parties, that the alleged act was not committed: *Lewis v. Lewis*, 106

DRAINAGE OF LAND.

1. A "water-course" is a stream usually flowing in a particular direction, in a channel, and discharging into some other stream or body of water; and it does not include surface water conveyed from a higher to a lower level for short periods during the melting of snow, or during or soon after the fall of rain, or in hollows or ravines which at other times are dry: *Hoyst et al. v. City of Haverhill*, 656.

2. Although the owner of land can not divert from its natural course any water upon the land of another, to his injury, surface water falling or accumulating upon his own land (*Pettigrew v. Evansville*, 25 Wis., 223), yet the owner of lower land can not lawfully obstruct the flow of surface water thereon from the adjacent higher land of other proprietors, and in so doing may turn the water back upon such lands or off from his own lands on to or over the lands of another: *Ib.*

3. *Quere*, whether there may be an exception to this rule in the case of a region, where large tracts of land are drained through a narrow gorge, and the region is submerged or greatly injured by its obstruction, so that the rule if applied would operate adversely to the interest of agriculture: *Ib.*

4. Cities, towns and villages, as owners of lands for highways and other public purposes, have the same rights as private owners to obstruct or repel the flow of surface water: *Ib.*

5. Where the passage of surface water through a ravine is obstructed by the acts or agents of a city in the construction of streets, the owner of adjacent lands damaged by such obstruction can not recover damages therefor: *Ib.*

DURESS.

1. A promissory note in settlement of a claim may be void as given in exchange for an agreement to suppress a criminal prosecution, although no threats of prosecution were made at the time of settlement, if they have been made a few days before the note was given, and have not been retracted: *Taylor v. Jaques*, 106 Mass., 291.

2. The threat of a criminal prosecution, used to compel the giving of a promissory note, may constitute duress, although the amount for which the note is given is not unreasonably due to the payee from the maker: *Ib.*

EJECTMENT.

1. Ejectment can not be maintained to recover the title and possession of land or a highway dedicated by the proprietor of the soil to public use. Indictment for obstruction is the proper remedy: *West Covington v. Freking*, 8 Bush, 121.

2. The owner of the land may maintain his action to recover the title and possession against those who are setting up an adverse claim to it, although he has been in possession for a long time: *Ib.*

3. A judgment in ejectment against the defendant is conclusive evidence of his title, if he was in possession when the writ was served: *Sopp v. Winpenny*, 68 Penn., 7.

ELECTION.

1. In a petition for contesting an election, alleging that the election was void because the places appointed by law, etc., it is not material that it does not allege that any irregularities were committed for the purpose of advancing the election of the respondent and defeating the complainant: *Melvin's Case*, 68 Penn., 333.

2. Holding the election at the place fixed by law is essential to its validity. It seems, however, that on the destruction of the designated building on the site of the election, it might be held on the same or contiguous ground. In such case the election must be absolute, not merely convenient. *Ib.*

an election be held at a place not fixed by law, the returns should be stricken the return judges: *Ib.*

whole election district may be stricken out on showing an entire disregard of duty to the law in holding it, either by design or ignorance: *Ib.*

Where an election was not opened till 2 o'clock P. M., the law requiring it to be between 6 and 7 o'clock, A. M., the return should be rejected: *Ib.*

TABLE JURISDICTION AND RELIEF.

M. and others file a bill for the sale of land in which infants are interested, and interest of M. is stated in the bill to be one-half the tract. The land is sold and confirmed, money paid and conveyance. In fact, M. is entitled to the whole and files her bill of review to set aside the sale on the ground of mistake. The title of M. as to her rights, was a mistake of law, and a court of equity will afford relief in such case: *Zollman v. Moore, et al.*, 21 Grattan, 313.

The prayer of the bill being for a sale of the land, and the decree and sale being made, and the deed conveying it, the title of all the parties to the suit passed by the court: *Ib.*

The purchaser was not bound, as against the parties to the suit, to inquire whether their title to the property was such as stated in the bill: *Id.*, 313.

The purchaser is a *bona fide* purchaser for value without notice, and having the title, M. is not entitled to recover against him: *Ib.*

If a discovery from the plaintiff is necessary to enable the defendant to make his defense at law, he must file his bill for the discovery before the judgment has been rendered against him. And he can not go into equity for discovery and relief after the judgment after it has been rendered: *Green & Suttle v. Massie, Ib.*, 356.

That money is scarce, and that the large cash payment required at a sale under a deed of trust, will be attended with great if not irreparable loss to the owner of the property, is no ground for an injunction to the sale: *Muller, &c., v. Bayly, et al., Ib.*,

TABLE LIEN.

A. sold land to B., October 30th, 1856, taking three land warrants from him in payment, relying upon B.'s representations that he was the owner thereof. The warrants were genuine, but the assignments thereof were forged, in consequence of A. acquired no title in the warrants by the transaction. Both parties were ignorant of the fact that said assignments were forged, and believed that they were genuine, and there was no intention on B.'s part to deceive or defraud A., who discovered that the assignments were forged as to two, in 1861; as to the third, in 1863: *Id.*, that that part of the purchase money, in payment whereof said warrants were so taken, remained in fact unpaid, and that A. had an equitable lien therefor on the land: *Duke v. Balm, et al.*, 16 Minn., 306.

Prior to said purchase, B.'s wife had lent and advanced to him a sum of money, for separate property, upon the agreement that B. might invest the same in land, or otherwise, and be the owner of such lands or other purchases, in his own right, but when requested, was to account to his wife for the said loan, and transfer the funds, or any land purchased with them. Said warrants were purchased with a part of said money by B., for himself, and as his property. Subsequently to said purchase said lands were conveyed by B. to his wife, at her request, to apply on the loan, at an agreed valuation.

Id., that B.'s wife was not a purchaser for value within the rule that the equitable lien of the vendor for unpaid purchase money will not be enforced against a *bona fide* purchaser, for value, without notice: *Ib.*

EQUITY PRACTICE.

1. The object of a preliminary injunction is simply preventive, to maintain as they are until the rights of the parties can be considered and determined at a full hearing. Preliminary injunction is never awarded except when the equity of the complainant is clear, supposing the facts of which he gives *prima facie* evidence to be ultimately established: *Audenried v. P. & R. R. Co.*, 68 Penn., 370.

2. A tribunal which finds itself unable directly to decree a thing, should attempt to accomplish it by indirection. *Ib.*

ESTOPPEL.

1. If a person encourages another to purchase either land or a chattel, he may afterward assert any title in himself to the thing purchased, although he may have been ignorant of his rights when he gave the encouragement; for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, in the same manner as if there had been a fraudulent purpose. *Bunce, Admr.*, 49 Mo., 231.

2. No estoppel of record is created against one not a party to the record, though he had instigated the trespass, on account of which the action was brought, aided in the defense of the action, employed counsel, introduced his defense, and paid the costs, and though he and the present defendant claimed the land under the present trespasser.

The principle of estoppel by record, by which an end is put to litigation, and all parties and privies are concluded, and can not be heard to make averment contrary to the finding of a jury, fixed by judgment in regard to a fact precisely put in issue, and is acted upon in all modes of procedure; and while, under our present system the complaint and answer are usually so diffuse that an issue is not joined, with a precision which is required to work an estoppel, yet when the plaintiff avers title in the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title as compared with the finding of a jury. The only plea was *liberum tenementum*: *Falls v. Gamble*, 66 N. C., 455.

3. One who has, and knows he has title to property, who is present at a sale of the property of another, and who, when it is publicly announced before the sale commences, that all persons claiming the same are requested to make their claim, remains silent, is estopped afterwards from setting up his title to the property purchased for value at said sale: *Mason v. Williams*, 564, *Ib.* See also *Bunce, Admr.*, 49 Mo., 231.

4. One who accepts a deed for property, and claims and acts under it, knowing the facts constituting title, and intends to hold under it if he can, has such notice as the law intends by that term, and every reason applies why it should be disclosed, which applies in the very rare case of absolute knowledge that the title is good: *Ib.*

5. There is a qualification of the rule to the extent, that the true owner may mean for the purchaser to act upon his representations, but one comes within the qualification even, who, by his conduct, whether it be fraudulent and *malicious* or simply negligent and omissive, gives others reasonable ground to believe that he has no claim (for in this connexion, title and claim are synonymous) to the property, and such others do so believe and act on such belief: *Ib.*

6. Not only the *uberrima fides*, but that simple *bona fides* which the law requires from every man, required the true owner to make known his claim to the purchaser at sale or never; he should have given all bidders the advantages he possesses

exclusive knowledge, his omission to do so amounted to a negligence which impaired the interests of others and gave him an unfair advantage over them, enabling him, if he could, to buy low, and thereby secure an indisputable title, or, if he could not, to fall back on his reserved claims: *Ib.*

No estoppel arising from a sheriff's deed is fed by an after-acquired interest—when A. had no title to land sold under execution as his property, so that the deed passed at the time by such deed, one who afterwards takes a deed from the sheriff in such execution, is not estopped to show that in fact his vendor had no title at the date of the execution sale.

Neither is such vendee estopped to show want of title as above stated by any rule of law; as the rule that when both parties claim under the same person, neither is permitted to deny his title has been adopted for the purpose of aiding the administration of justice by dispensing with the necessity of requiring the proof of original grants and *mesne* conveyances, and after the rule has effected this purpose it is *actus officio*, and the matter is then open in regard to the title, subject to the doctrine of estoppel, and such other principles as may be applicable: *Frey v. Ramsour*, 10 C., 466.

The rule is, that when one, by his conduct, unintentionally, gives another reason to believe that a certain state of facts exists, and the other acts on the faith so induced, that he will be damaged if it is not true, the person so inducing is estopped as to the other, afterwards to deny the existence of such a state of facts: *Turner v. The Land and Lumber Co.*, *Ib.*, 503.

The principle that a tenant can not dispute his landlord's title is in full force, but a tenant was never prevented from showing an equitable title in himself, or any facts which would make it inequitable to use his legal estate to deprive him of the possession.

For this purpose, formerly, the tenant was driven into equity, but under the present law, the tenant in such cases can avail himself of such equitable defense by his plea: *Turner v. Lowe*, *Ib.*, 413.

The fact that in a former suit by the present defendants against the present plaintiffs complainants therein sought to compel the execution of a new lease in form for ninety-nine years, and that the defendant in that suit (the plaintiff herein,) demurred to a bill on the ground that the covenant to renew was a personal covenant of the original lessors, and did not bind him; and the determination of the court in that case that "the covenant to renew the lease ran with the land, and bound the defendant as assignee of the reversion," do not estop the present plaintiff from now claiming that said lease was a demise for the ninety-nine years, which took effect upon the giving of due notice by the lessees: *Orton v. Noonan et al.*, 27 Wis., 272.

ROBA.

A broker is a mere negotiator between other parties, and does not ordinarily act in his own name, but in that of his employer. He is not intrusted with the custody of goods which he may be employed to buy or sell, and is not authorized to buy and sell in his own name. A factor may buy and sell in his own name, as well as in the name of his principal, and he is entrusted with the possession, management, control and disposal of the goods to be bought or sold, and has a special property in them. A broker has ordinarily no authority, *virtute officii*, to receive payment for property sold by him; and if payment is made to him by the purchaser, it is at his own risk, and from other circumstances the authority can be inferred. If a broker sells the goods of his principal in his own name, without some special authority so to do, inasmuch as he exceeds his proper authority, the principal will have the same rights and

remedies against the purchaser as if his name had been disclosed by the brokers may sue in their own name for the price of goods sold by them for their principal and have a right in their own names to receive payment, and to discharge them from their official transactions, unless notice is given to the contrary by their principal. Where goods are sold by sample, as in this case, and the purchasers were formed in the city of Louisville, at the time of the sale, that they were not in possession of the seller, but were in the East, and were to be shipped and delivered to purchasers thereafter, the law will infer that the purchasers knew the goods belonged to other parties, and that the seller was a mere broker: *Graham & Co. v. Ditch & Co.*, 8 Bush, 12.

FENCE.

Adjoining landowners agreed not to make any common division fence; each was liable to the other for trespass from his cattle: *Milligan v. Wehinger*, 68 Penn., 23.

FIDUCIARY OBLIGATIONS.

The discharge of a bankrupt does not relieve him from fiduciary obligations for the security of the bankrupt, having paid his liability on his guardian's bond, receiving judgment against him, and subjected his estate acquired after his discharge. *Adm'r, v. Curtin, etc.*, 8 Bush, 141.

FIXTURES.

Where land is sold and conveyed, having situate and upon and attached and to it a steam saw mill and machinery, they will be regarded as a part of the land and will pass to the grantee by the conveyance: *Pea v. Pea*, 35 Ind., 387.

FORECLOSURE OF MORTGAGE.

1. One who buys land subject to a mortgage, which he undertakes to pay as part of the purchase money, can not set up the defense of usury in an action to foreclose the mortgage: *Thomas v. Mitchell*, 27 Wis., 414.

2. In foreclosure of a mortgage made by husband and wife to secure his note of the husband which would estop him from setting up usury in the note, do not bind the wife, in respect either of the homestead, or of her vested dower interest: *Cummins v. Babcock, Ib.*, 512.

FOREIGN JUDGMENT.

When the courts of a sister State have jurisdiction, its judgments are final and conclusive in every other State: *Reber v. Wright*, 68 Penn., 471.

FORGED CHECK.

The responsibility of the drawee, who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not, by his own fault or negligence, contributed to the success of the fraud, or to mislead the drawee. If the payee took the check, drawn payable to his order, from a stranger or other person, without inquiry, although in good faith and for value, and gave it current credit by indorsing it before receiving payment of it, the drawee may recover back the money paid: *National Bank of North America v. Bangs*, 106 Mass., 441.

FRAUD.

1. Where one purchases the whole of a debtor's property subject to sale on condition, knowing that his vendor is largely indebted, and has recently declared his intention not to pay, the mere fact that such debtor assures him, at the time of the sale, that one purpose of it is to enable him to pay the debt, will not purge the transaction of bad faith; but the vendee must see to it that the purchase money is actually paid (so far as necessary) to the discharge of such debt: *Avery v. Johann et al.*, 27 W.

Fraudulent misrepresentations and concealment by the vendor of land as to the area, quality, quantity, situation and title thereof, in order to entitle the vendee to relief, must be in reference to some material thing unknown to the vendee either from want of examination or from want of opportunity to be informed. And if the buyer relies on representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily in his reach, he must suffer the consequences of his own folly and credulity. The vendee must go further, and show that some deceit was practiced for the purpose of putting him off his guard, or that some special confidence was reposed in the representations of the vendor, and that the contract was made and entered into upon the strength of that confidence. And in such cases there should be the clearest proof of the fraudulent misrepresentations: *London v. Green*, 49 Mo., 363.

Ordinarily, the maxim of *caveat emptor*, applies equally to sales of real and personal property, and is adhered to in all courts, where there is no fraud. But representations made by one party to a contract, which may be reasonably relied on by the other, constitute a material inducement to the contract, are knowingly false, and cause loss to the other party relying on them, and such other party has acted with ordinary prudence, he is entitled to relief in any court of justice.

If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress if he fail to avail himself of those sources of information which he may readily reach, unless prevented by the artifice or concealment of the other party.

So, if the false representation is a mere expression of commendation, or simply a matter of opinion, the parties are considered as standing on an equal footing, and the facts will not interfere. In contracts of this character, fraud without damage, or negligence without fraud, are usually not the subject of an action for deceit: *Waleh v. Waleh*, 66 N. C., 233.

DECEITS, STATUTE OF.

1. In case of simple contract, where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though no consideration does not move from him: *Putney v. Farnham*, 27 Wis., 187.

2. After notice of such promise given to such third person, and assented to by him, the promisee cannot forbid payment to him, or without his consent require payment to be made to himself—even if he could do so before such notice and assent, which is not decided: *Ib.*

3. Where a debtor promised orally to pay part of his debt by paying his creditor's indebtedness to a third person, the latter being notified of such understanding, and having assented thereto:—

Held, that the promise, being one to pay in a certain manner *promisor's own debt*, is not within the statute of frauds; and the promisor was not liable for the amount of garnishment by a judgment creditor of the promisee, although the garnishee process was served before actual payment to the third party. *Ib.*

4. A verbal agreement at the time of the execution of the deed, that the grantor should hold possession of the land during his life, may be enforced in equity: *Currier, &c., v. Carpenter*, 8 Bush, 283.

5. A trust was created by purchasing land at an execution sale, upon a verbal agreement, between the owner and the purchaser, that the purchaser would hold the land as security for the money advanced and interest, and that the owner should have the right to redeem: *Williams v. Williams*, *Ib.*, 241.

GIFT.

A present bond to pay a sum of money at the obligor's death, and delivery, renders

it perfect as a present obligation, and is irrevocable: *Mack and Person's A. Penn.*, 231.

HIGHWAYS.

1. The owner of the land over which a highway passes retains the fee and right of property not incompatible with the public enjoyment; and when a highway is abandoned the owner of the land holds it without incumbrance (*Jell on Highways*, 301); *West Covington v. Freking*, 8 Bush, 121.

2. The owner of the soil not only retains the fee, but he is entitled to all mines etc., that may be discovered imbedded in the highway; and such mines may be worked by him in such manner as not to interfere with the public use: *Ib.*

HUSBAND AND WIFE.

1. A mechanic's lien was filed against Woodward for materials furnished to him on a lot described as "belonging to the above named Woodward," who was in the claim "as owner, or reputed owner." In an affidavit of defense by Woodward to a *scire facias*, he averred that the ground belonged to his wife, that he was in possession of the lot, and without her consent, but at his own instance and for his own fit, without her knowledge, he contracted for the materials, etc:—

Held, to be insufficient: *Woodward v. Wilson*, 68 Penn., 208.

2. The creditor alleging in his claim that title was in the husband, could not obtain judgment against the husband, sell and purchase his title, and thus contest the claim to the property by ejectment. *Ib.*

3. As a general proposition a wife, who does not stand in the relation of a co-owner to her husband, can not set aside his voluntary alienation of his personal property: *Bonslough v. Bonslough*, 68 Penn., 495.

4. Arrears of alimony can not be collected by the administrator of the wife; if the husband has evaded the payment, and compelled the wife to contract debt, the administrator may recover for benefit of creditors: *Ib.*

5. A direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: First, where the consideration for the transfer is a separate interest of the wife yielded up by her for the husband's support or that of their family, or which has been appropriated to him to his use. Second, where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate and exclusive use of his wife: *Sims, et al., v. Ricketts*, 35 Ind., 181.

6. Whenever a contract would be good at law if made by a husband with a third party, for his wife, that contract will be sustained in equity, when made by the husband with his wife without the intervention of trustees: *Ib.*

7. The contract of a husband can not create a mechanic's lien upon the real estate of his wife: *Johnson v. Tutewiler, et al.*, 35 Ind., 353.

ILLEGAL CONSIDERATION.

1. Where a promissory note was given by A. as principal and B. as surety for the consideration of which was the hiring of a substitute in the Confederate States Army, and afterwards the surety, at the request of the principal, paid off said note for its value, and the principal gave his note to the surety for the amount paid:—

Held, that the last contract was a new and independent one, founded upon the consideration of money paid at the request of the principal, and that it was not affected by the illegality of the original note, nor by any knowledge which the surety might have had of that fact: *Powell v. Smith*, 66 N. C., 401.

2. A note founded upon an illegal consideration, payable one day after date, in

day from its date, can not be recovered on by the indorsee: *Bancum v. Smith, Ib.*

If money be lent to aid in the accomplishment of an illegal purpose, such illegality is not purged by the borrower failing so to apply the money: *Kingsbury v. Manning, Ib., 524.*

INFANTS.

The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to this extent, to show cause existing at the rendition of the decree, and not such as arose afterwards. The question must always be, can any cause be shown why the decree, at the time it was rendered, was not a legal and binding decree: *Walker's Ex'r et al. v. Page et al, 21 Grattan, 636.*

A. dies in 1855, leaving a widow and children, some of them infants. Dower is assigned to the widow, and the guardian of the infants files a bill for the sale of their interest in the dower property, making the widow and adult children parties. In March, 1863, there is a decree for the sale of the whole property, and the sale is made, the proceeds invested in Confederate bonds, the widow to receive the interest during her life. After the infants come of age, they seek to set the sale aside on the ground that it was not for their interest:—

Held, if the court that pronounced the decree had jurisdiction of the subject and parties; if its proceedings were regular and in accordance with the requirements of the law; and the decree is sustained by the evidence then introduced, the infants can not be allowed, as against a *bona fide* purchaser, to go out of the record to show, upon facts and events arising since the rendition of the decree, their interests were not promoted by a sale of their real estate. *Ib.*

In this case all the papers in the cause were destroyed, except the decrees; but decrees showing by their recitals that the proceedings had been regular, and that the Court was satisfied the sale was for the interests of the infants, and the investments and conveyances having been made according to the decree, the sale and investments were sustained: *Ib.*

INN-KEEPERS.

An inn keeper has a lien upon the baggage or goods brought to his house by a guest, for the amount due from the latter for board and lodging, and this even where the goods belong to a third party, but are lawfully in the guests possession: *Mann et al., v. Hollenback, 27 Wis., 202.*

Where the inn-keeper, without any fraud being practiced upon him, accepts a draft drawn by the guest in payment of his bill, and voluntarily relinquishes possession of the goods, it seems that his lien is lost, and will not revive if the goods are again into his possession: *Ib.*

But where he is induced to part with his possession by fraudulent representations of his guest, (as that a draft given by the latter for the amount of his bill is good and will be paid, when he is not in fact, authorized to draw such a draft), there is no waiver of the lien: *Ib.*

INSURANCE.

The application for a policy of insurance, forms a part of the contract of insurance, where the policy refers to it as such. And in an action by the insured on such policy, the burden of proof is upon the plaintiff.

The application must be set out in the complaint, and being in the nature of a declaration precedent, the truth of its representations must be proved by him. A misrepresentation as to the value of property insured, is material, even though the policy contains a stipulation to pay two-thirds of the real value or less if the loss

were not so much, but the doctrine of immateriality does not apply in such the representation forming a part of the contract, and being made in response to a direct question.

A charge in such a case, that the application was not a part of the contract, the declaration as to value by the insured was a mere *representation*, and that the question for the consideration of the jury was the value of the property insured, erroneous, and the error is not cured by the remark afterwards made to the effect that unless such statements were fraudulent and false, they would not deprive the plaintiffs' right to recover. Even treating the statement as to the value as a representation, it is not a correct principle, that to prevent a recovery, it is necessary to show that the statement was fraudulent, as well as false, and herein lies the difference between a representation as an *opinion* and a representation of a *fact*. It is sufficient to avoid the policy that the representations were false, *however honestly made*. If material they must be *perfectly true*: *Bobbitt v. The L. & L. & G. Ins. Co.*, 66 N. H.

2. The United Life, Fire, and Marine Insurance Co., and the Kenton Insurance Company, had the same general agent in Louisville. Shea & O'Connell, through said agent a policy on goods, etc., in the company first named, and on the next day they obtained from said agent a policy on the same goods, etc., in the second company. Formal notice was not given to the first insurer, nor was it thereto written upon its policy. In a suit against it to recover for a loss which occurred more than sixty days after the date of its policy, the United Life, Fire, and Marine Insurance Company, as a bar to a recovery, relied on the following provisions in its policy, to-wit: "If there is or shall hereafter be made any further insurance on the property hereby insured without being notified to this company of its consent thereto written hereon, then and in that case this policy shall be void and binding force on this company."

Held, the second insurance did not render the first contract absolutely void. The company had the election, after notice of the violation of the contract, to cancel the policy by returning a proper proportion of the premium, or to retain the policy and permit it to remain in full force.

Good conscience and fair dealing required the company, in case it was intended to enforce the forfeiture, to take the necessary steps within a reasonable time after notice of the second insurance. The knowledge of the agent was notice to the company. *Von Borries & Co., v. The United Life, Fire & Marine Ins. Co.*, 8 Bo.

3. A merchant to whom goods are consigned for sale on commission, and instructions from his principal to insure for his benefit, is bound to obey the instructions or indemnify the consignor against any losses. And although usually there is no insurable interest in the goods further than the amount of his probable commissions or profits, yet, in case of such instructions, he may protect himself against loss by insuring the whole property consigned, and to this end he should be considered as insured for the full value of the property, and would be entitled to recover from the insurance company in case of loss. In such case the policy ought to insure for the benefit of the principal, and the agent or consignee ought to be treated as a trustee for the consignor, and the amount of the recovery should go to the principal. In a suit upon the policy, in the name of the consignee, this may be shown to prove that he had an insurable interest as trustee for his consignor: *Shaw v. Ins. Co.*, 49 Mo., 578.

LANDLORD AND TENANT.

If a landlord erects, without the tenant's consent, on land included in the lease of a dwelling house, a permanent structure which renders unfit for use two

the tenant was using for kitchen and bed-room, the tenant may elect to treat it as an eviction, and give up the premises, and refuse to pay rent: *Royce v. Gugger*, 106 Mass., 201.

DOWNER.

An upper landowner has a right to discharge waters which by nature rise in, flow all upon his land, upon the lower lands, so long as the natural course of the stream or drainage is not diverted: *Hays v. Hinkleman*, 68 Penn., 324.

LEASE.

A lease may be avoided by parol evidence that it was made with the intention that the demised premises should be used for an unlawful purpose, and of their actual use for that purpose, although it contains an express covenant of the lessee to make a lawful use of them: *Sherman v. Wilder*, 106 Mass., 537.

A lease originally void for illegality of the purpose for which it was made, does not become valid by an assignment of it by the lessee: *Ib.*

By a certain instrument, A. and B. lease to C. and D., their heirs, etc., a certain quantity of water, at a certain dam, for four years; and after a covenant by lessees to pay a specified rent, and one by lessors to raise the dam, etc., and a stipulation that the lessees might purchase the water in question at a specified price, a clause is added by which the lessors "further covenant and agree, that in case lessees shall not purchase the water, as hereinbefore provided, and shall signify their wish to lessors, their heirs, etc., at the expiration of this lease, to have the same extended, they, the lessors, do hereby covenant and agree for themselves, their heirs, etc., to extend the lease for a term of ninety-nine years; provided always, that in case said lease shall be so extended," the lessees shall pay a certain annual rent. Dixon, C. J., was of opinion that this was not merely a covenant to renew, but was a demise for a future term of ninety-nine years, to take effect at lessees' sole option and on the giving of due notice; and that the plaintiff, as assignee of the lessors, could recover in an action upon the lease for rent alleged to have accrued after the expiration of the four years' term, the lessees having given due notice of their election to have the lease extended, and no instrument having ever been executed for the purpose of renewing or extending said lease: Cole, J., was of the opposite opinion; Paine, J., did not concur in the case: *Orton v. Noonan, et al*, 27 Wis., 272.

In a former decision in this cause (on demurrer to the complaint), that a certain contract between plaintiff's and defendant's grantors was not a demise of water, but merely, but of an interest in land, and that the lessors' covenant to renew the lease was with the land and binds defendant (who took the reversion with knowledge of the lease) followed *res adjudicatae*: *Noonan et al v. Orton, Ib.* 300.

Covenants to raise a dam to a certain height, to keep the dam and flume in good repair, and to supply lessees with a certain quantity of water, run with the land on which such dam and flume are situate: Per COLE, J., *Ib.*

LEGISLATURE.

When property has been attempted to be taken by a judicial proceeding, which is void for want of jurisdiction; the legislature can not validate it: *Richards v. Rote*, 27 Penn., 248.

LIBEL.

One who writes an article in English, and employs another person as his agent to translate it into German and publish it, will be liable if the German article so published is libelous, although the translation is inaccurate: *Wilson v. Noonan*, 27 Wis., 598.

LIEN.

The wrongful refusal of a Court to permit a judgment creditor to have execution on his judgment, does not operate (upon the abolition of such court, pending appeal from such refusal,) to impair any lien acquired theretofore, or which might have been acquired thereafter, but for such refusal, under the maxim *actus legis non nocet injuriam*. Hence, where, after judgment obtained in 1861, and executions returned and kept up thereon, a motion was made by a judgment creditor, in 1866, in one of the late County Courts for execution upon his judgment, which was wrongfully refused, and pending an appeal therefrom, such court was abolished, it was held that the lien purchased from the debtor pending the appeal, took the legal estate, but such lien as would have been acquired had execution issued.

In such a case, if the judgment creditor had not a complete lien, with a right to perfect by issuing an execution, his proceeding to cause execution to be issued constituted a *lis pendens*, of which every one is held to have had notice, and a purchaser from the judgment debtor, pending the proceedings, is considered as dealing with him under exactly the same conditions and subject to the same liens. If the County Court had not refused an execution, and the same had been regularly issued, the creditor so delayed must be placed in *statu quo*, and as a corollary, any purchaser is affected with notice by a presumption *juris et de jure*.

The above stated rule is founded on the maxim *pendente lite nihil innovetur*, sustained by considerations of public policy: *Isler v. Brown*, 66 N. C., 556.

MORTGAGE.

1. Upon the execution of a mortgage, the mortgagor becomes the *equitable* owner, the mortgagee the *legal* owner, and this relative situation remains until the mortgage is redeemed or foreclosed. Until the day of redemption be past, the mortgagor retains his legal right, and after, an equity of redemption.

A mortgagor allowed to remain in possession, by the long acquiescence of the mortgagee, is not a trespasser but a permissive occupant. Such a mortgagor is entitled to reasonable demand to terminate the implied license before a purchaser can be brought to recover possession. A purchaser of the mortgagor's estate, pending execution, and, (where he has leased,) his lessees, are entitled to the right of termination: *Hemphill v. Ross*, 66 N. C., 477.

2. A court of equity will never decree a foreclosure of a mortgage until the time limited for payment has expired. It cannot shorten the time given, by express stipulation and agreement between the parties, as that would be to alter the nature of the contract to the injury of the party affected: *Harshaw v. McKesson*, *Ib.*, 266.

3. When a mortgage is executed, and it is stipulated that if the mortgagor does not well and truly pay and discharge said debts, according to agreement—the contract is void in part in three years, one-third in four years, and the remainder in five years from the date of the deed:—

Held, that the said mortgage cannot be foreclosed until the last period mentioned: viz: five years. If the said deed had stipulated that the estate should be forfeited in case of the failure to pay the specified instalments of debts, then on said failure the mortgagee could have called for his money or proceeded to foreclose: *Ib.*

4. Where a bill to foreclose a mortgage is filed against several defendants, who all claim a portion of the lands described in the pleading under a prior mortgage, and they do not ask that the same be sold:—

Held, that it is error to decree that said mortgaged premises be sold for the benefit of the said defendants: *Ib.*

5. Where a mortgage is executed to secure the payment of several prom-
ises,

when they shall become due, it may be foreclosed upon non-payment, when of any of the notes: *Miller v. Remley*, 35 Ind., 539.

Where a negotiable promissory note, by its terms payable on a day certain, and bank specified, has never been left at the bank, and the only authority of bank and its officers is that conferred by the terms of the note, the payee being absent from the bank with the note in his possession and the maker informed of a tender, by the maker to the cashier of the bank, of a sufficient amount in money in payment of the note, made at the law day, coupled with the condition the note be delivered to him, not kept good, nor in any manner renewed, not discharge the lien of a mortgage given to secure the note: *Bolme et al., v. Baugh et al.*, 16 Minn., 116.

An assignment of a mortgage debt carries the mortgage with it: *Moore v. Cor-*
88 Penn., 320.

MUNICIPAL CORPORATIONS.

The city of Louisville can require the tram rail to be substituted for the crescent used in the street railway tracks constructed by the Louisville City Railway company, under a contract with the city for the right of way, etc., in which it was stated that the *most approved rail* should be used, etc. The law under which the act was made reserved to the city council the right to regulate and control such ways as it may authorize to be laid down and operated in the streets and highways of the city. All the streets in the city were bouldered or macadamized when railway tracks were constructed with the crescent rail. The city, having inaugurated a system of street improvements by which the "Nicholson" is gradually being substituted for the stone pavements, required the railway company to take up its crescent and put down the tram rail as the construction of the Nicholson pavement progressed. It being agreed that the tram was the better rail for streets in which the Nicholson pavement was used:—

Id., that the city had the right to require the railway company to substitute tram for the *crescent rail*, at the cost of the railway company, as the construction of Nicholson pavement progressed: *Louisville City Railway Company v. City of Louisville*, 8 Bush, 415.

Municipal corporations have no power to limit their legislative discretion by contract. They may contract as individuals, but their legislative enactments must necessarily have the same effect upon their individual contracts as upon those of persons, artificial or natural, or of the general public: *Ib.*

The city can not refuse to exercise its power to regulate and control its streets and highways when public necessity or convenience demands that it shall be done: *Ib.* Nor can the city be allowed to excuse its failure in this particular upon the ground that it has by contract deprived itself of the right to act: *Ib.*

The general council could not by contract deprive itself of the power to regulate and reconstruction of railways made necessary by the changes in the character of pavement used upon the streets of the city: *Ib.*

The city government has the general power to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally.

When the use to which the owner devotes his property becomes a nuisance, he may be compelled to cease to so use it, and punish him for refusing to obey its ordinances and regulations concerning such use: *Ib.*

The contract for the right of way, etc., between the city and the Louisville City Railway Company provided that the city shall not be liable for any damage "from any cause in the transportation of passengers that may be incurred by the laying of sewers,

water or gas pipes," etc. The company refused to take up its track to enable to construct a sewer, and thereupon the city caused the track to be taken up and refused to replace it. For thus taking up and refusing to replace the track the city did not become liable for damages to the railway company. *Ib.*

8. The amendment of 1869 of the charter of the city of Covington, Ala., by the city council, by a unanimous vote, to require the northern portion of Madison street to be paved with Nicholson pavement at the cost of the owners of the lots fronting thereon, is held to be unconstitutional. Said amendment confers upon the city council the power to improve the streets or alleys, etc., or parts thereof, with Nicholson pavement, at the cost of the property owners, "whenever the owners of the larger part of the front feet of the ground fronting on the street proposed improvement shall petition therefor, and in no other state of case." This petition applies to every street, alley, market space and public place in the city, including the northern portion of Madison street, which seems to be the leading thoroughfare in the city. It places the lot owners on the northern portion of Madison street at the mercy of a unanimous council, and leaves it within the power of the owners of the greater number of front feet abutting on every other street, etc., to prevent the improvement of such street, etc., with "Nicholson pavement" at their individual expense by merely failing to petition therefor: *Howell, &c., v. Bristol, &c.*, 8 E.

9. Perfect equality in the imposition of local taxation can not be attained, nor uniformity in the manner of assessment, and approximate equality in the amount of exactions, are essential to the constitutionality of such taxation. This principle is applied, in this case, to an act authorizing street improvements to be made under different rules and regulations in the same city at the cost of owners of adjacent lots.

10. A law imposing taxation on the general public, the evident intent and probable result of which is to equalize the burdens so far as practicable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable if not the necessary consequence of the law is to produce the most oppressive inequality, and to compel a minority of tax-payers to provide at their own expense an improvement of great utility and public interest, the construction of which costs more than double the value as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of "arbitrary power" over the property of this minority; it becomes, in the constitutional sense, a taking and appropriation of their property to the public use without compensation.

No such power over the property of the citizen can be constitutionally exercised by any department of our State government: *Ib.*

NUISANCE.

1. The alienee or grantee may become responsible for the continuance of a nuisance either to a party originally affected by it, or another deriving title from him. But a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove it, or in some way informed that its removal is required. The injured party should be considered to acquiesce in the nuisance if he requests a removal of the nuisance. Knowledge of the existence of the nuisance is not equivalent to a request or notice to remove or reform it. *West & Bush, Lex. & Cin. R. R. Co.*, 8 Bush, 404.

2. The right to abate a nuisance or to recover damages for its continuance is barred by the usual analogous period of limitation: *Ib.*

OVERSEER.

overseer who contracts to carry on a farm for the owner at a fixed salary for the year, is entitled to recover for the value of his services, where he quits his employer before the expiration of the year, because his employer sells out the plantation, stock and crop, and directs the overseer to remain and carry out the contract with the purchaser of the plantation: *Woodley v. Bond*, 66 N. C., 396.

CAPITAL AND AGENT.

C., president of a railroad company, and A., agent of the company, borrow money from H., and give their own bond for it. The money is borrowed for the use of the company, which is itself without credit, and it is immediately turned over to the company. A., as agent, receives money of the company, out of which he is expected to pay the debt; but the bond having been given for money in suit, he can not pay, and C. and A. become insolvent.

Held: 1st. The money having been loaned to C. and A. individually, with the understanding that it was for the use of the company, and H. having chosen to take the responsibility of C. and A., cannot afterwards make the company his debtor: *Strider v. Winch & Pot. R. R. Co.*, 21 Grattan, 440.

The company having put money into the hands of A. to pay the debt, they are liable in equity as having received the benefit of the loan: *Ib.*

A bank check having the words "Ætna Mills" printed in the margin, and signed by B., Treasurer, is the check of the Ætna Mills and not of A. B.: *Carpenter v. Worth*, 106 Mass., 561.

MISSISSIPPI NOTES.

A. bought goods of B., on sixty days, C. to give A. credit, promising, verbally, that if A. did not pay for them, he would. The goods were delivered on the faith of C.'s promise. A. made default. Afterwards C., at B.'s request, and to secure him, issued an unsigned note for the amount due, payable sixty days thereafter to C., or to order, and delivered it to B., with the understanding that B. should procure A. to pay it, which he did.

Held, that C. was liable thereon as indorser: *Rogers v. Stevenson*, 16 Minn., 68.

If a note is payable at a bank in this State, a stipulation therein for the payment of attorney's fees, should suit be instituted thereon, will not destroy the commercial character of the paper: *Stoneman v. Pyle*, 35 Ind., 103.

Where a complaint against a railroad company for injuries to plaintiff's person alleges that they were caused by defendant's negligence in starting the train while plaintiff was getting upon it, without giving him sufficient time for that purpose, and defendant alleges that the plaintiff was negligent in getting upon the train when he did, facts showing the company's negligence in other respects than that charged, and not tending directly to produce the injury, are admissible in evidence against it, and they tend to show that under the actual circumstances, it was not negligent for plaintiff to get upon the train at the time, and in the manner proven: *Curtis et al. v. M. R. R. Co.*, 27 Wis., 158.

An instruction that if, under the circumstances of this case, the train, in being brought up to the station, came to a stop in such a manner as to induce the belief on the part of the passengers waiting on the platform that it had stopped for their reception, and then when they, acting on this belief, were going aboard, started again without caution or signal given, this would be an act of negligence on the part of the company, whether or not the starting was one of necessity, and whether the stop was an actual or only an apparent one.

Held not erroneous. It was the duty of the company to have some one there to

warn and prevent them, and of the persons in charge of the train not to stop until previous caution or signal given: *Ib.*

5. Arriving at his destination at half-past 8 p. m., the passenger left his baggage in the custody of the agent of the company, and during the same night the contents, including the baggage, were destroyed by fire.

Held, that in order to make the company liable for the baggage so destroyed, it is incumbent on the owner to show that the fire was the result of such negligence on the part of the employees of the company as would render liable a bailee for loss: *Cin. & Lex. R. R. Co. v. Mahan*, 8 Bush, 184.

6. Railroad companies are liable as common carriers for the baggage of passengers until the baggage is ready to be delivered to the owner at his place of destination, until he has had a reasonable opportunity of receiving and removing it: (*Stat. on Railways*, sec. 171, sub-sec. 3.) *Ib.*

7. If the baggage is not claimed and received in a reasonable time, it is the duty of the company, after giving the passenger a reasonable opportunity to claim his baggage, to store it in some safe place until called for. But the company is not liable for the baggage when so stored as a warehouseman, and not as a common carrier: (*Stat. on Railways*, sec. 171, sub-sec. 3; *Roth v. Buffalo and State Line R. R. Co.*, 548.) *Ib.*

8. The charter of the R. & D. railroad company provides that "all machinery, engines, vehicles, or carriages, belonging to the company, with all their work and profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal property, and exempt from any charge or tax whatever.

Held, the real estate owned and used by the company for the purpose of its business is embraced in the provision, and is personal estate: *City of Richmond and Danville R. R. Co.*, 21 Grat., 604.

9. All the said property, real and personal, is exempt from taxation, both by the state and municipal: *Ib.*

10. The exemption from taxation of the real estate of the company in the city of Richmond, is not unconstitutional as being in conflict with the charter of the city previously granted, giving the city the power to tax real estate for the purpose of defraying the city having ample means of taxation left for the payment of its expenses and debts: *Ib.*

SHERIFF.

A sheriff, on a sale by him under execution, can demand cash of the purchaser on his refusal to pay it, (even though such purchaser, as an execution-creditor, is entitled to the proceeds of sale, less the cost, and offered to pay cash to the sheriff to cover the costs and entered satisfaction for the residue,) may immediately re-sell the property: *Andrews* 66 N. C.

SURETY.

1. If a creditor enters into any valid contract with a principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are affected, such contract discharges the surety. Mere delay on the part of the creditor to sue for or collect the debt, or even his refusal to do so, when requested by the debtor or his express promise of indefinite indulgence, does not discharge the surety: *Ib.*

2. Where a creditor held a note given in 1859, and the principal debtor died in 1863, and the creditor declined to pay the same in Confederate money in 1863, which the creditor declined to do, but made an agreement that if the debtor would postpone the payment interest should cease "from that time until a demand." *Ib.*

Held, That such an agreement did not amount to forbearance for any definite or specified time, nor increase the risk of the surety in any way, and could not therefore discharge him from liability. It would seem that if the agreement had been to forbear until the end of the war, it would have been *nudum pactum*, and therefore no binding: *Deal v. Cochran*, 66 N. C., 269.

TELEGRAPH COMPANY.

1. A person sending a message by telegraph, who knows of the existence of certain rules and regulations adopted by the telegraph company touching the transmission of messages, though he does not use the blank of the telegraph company upon which the rules and regulations are printed, is as much bound by the rules and regulations as if he had written the message sent on such blank prepared by the company: *Western Union Telegraph Co. v. Buchanan*, 35 Ind., 430.

2. A telegraph company having in its employment an operator who does not know of the existence of a town which is the county seat of a neighboring county, and on the line of the telegraph, is guilty of gross negligence: *Ib.*

TROVER.

If a clerk at the post-office receives from J. S. a letter containing money, to be sent by mail as a registered letter, under a mutual mistaken belief that the letter can be registered to the place to which it is addressed, and then, on discovering the mistake, sends it by mail unregistered, by direction of his superior officer, and it is lost, they are liable to J. S. for its value: *Fitzgerald v. Burrit*, 106 Mass., 446.

TRUSTS AND TRUSTEES.

1. A trust was created by purchasing land at execution sales upon a verbal agreement between the owner and the purchaser that the purchaser would hold the land as security for the money advanced and interest, and that the owner should have the right to redeem: *Williams v. Williams*, 8 Bush, 241.

2. In this case the purchaser held the legal title to the land about fifteen years before the suit was brought in which the trust was established and enforced against him on his verbal agreement to hold the land and permit its redemption, etc.: *Ib.*

3. Land being held in trust for the sole and separate use of a married woman, and "after her death, in trust for her children and heirs," and "if she should die without issue living at the time of her death, then the same to pass to her right heirs," etc., she took only a life estate, and at her death, her children took as purchasers under the deed, and not by descent as from her, and at the death of one of the children, in infancy, his share passed to his father as his heir: *Churchill v. Reamer*, *Ib.*, 256.

4. Purchaser at decretal sale induced persons not to bid against him by giving assurance that on the return of the absent owner, he would let him re-purchase the property at the inadequate price given by the purchaser.

Held, that if the absent owner on returning home had sought or required, within a reasonable time, a re-sale of the property to him in compliance with the assurance given at the time by the purchaser, and the latter had refused compliance, the Court would regard him as having held the property in trust, and liable to account for the difference between the price paid and the amount for which he afterward sold the property.

But in this case the purchaser was absolved from the trust. It was made to appear that after the original owners return, the purchaser, in good faith, offered to let him repurchase the property by paying only what it had cost, including improvements, and not objecting to the proposition as unfair, or variant from the assurance given when the purchase was made, the original owner declined the privilege of repurchasing.

Held, that by thus declining to re-purchase, the original owner absolved the purchaser from any trust or liability which devolved on him by his promise or made at the sale, and waived his right thereafter to demand a compliance and left the purchaser free to keep or dispose of the property as his own responsibility to the original owner: *Roach v. Hudson, Ib.*, 410.

5. A devise of an estate to an executor in trust for one person, with power to the executor of affording to a third person the use of part of the estate, or of such use in monthly installments, did not vest in such third person a fee simple estate, legal or equitable, which should alienate or dispose of, nor did it create a debt to her which either she or her creditors could enforce inconsistently with the provisions of the will.

The will provided that the right of such third person to use the property should not be subject to alienation or sale; and that her right to use and enjoy the property should be terminated by any attempt to do so either by her or any creditor. The petition of a creditor of such third person to subject her right to the property, or the value of such use, to the payment of his debt is ordered dismissed: *White v. Thomas, Trustee, &c., Ib.*, 661.

6. Hutchings and Honore in 1861, jointly purchased thirty acres of land in Chicago, Ill. Hutchings advanced the entire purchase-price, took a conveyance of the land in his own name, and executed a writing in which, among other things, "it is agreed between said parties that when said land is sold, said Hutchings is to have first, his principal and dollars so advanced, and ten per cent. interest, and the profits over and above said sum to be equally divided between said parties. * * * * * The arrangement is to continue eighteen months, when, if the property has not been sold, said Honore is to pay one half the sum so advanced, with the accrued interest, and said Hutchings is to be sole owner of the same." The land was not sold within eighteen months, and Honore failed to pay any part of the sum so advanced. In 1869 Hutchings sold the land for one hundred thousand dollars, and refused to pay any thereof to Honore. Honore sued Hutchings for one-half of the net profits, deducting purchase-price, interest, etc.

Held, that a trust resulted in favor of Honore to the extent of one-half of the land jointly purchased. This interest he pledged to Hutchings, to secure the payment to him of one-half the purchase price advanced, etc.; and Hutchings retained the legal title to one-half of the land in trust for Honore, and the latter was entitled to one-half of the net profits realized upon the re-sale of the same.

The conveyance to Hutchings and the condition of defeasance executed by Honore, must be construed together, as though the one was incorporated into the other: (See Powell on Mortgages, 67.) When so construed, it appears that Hutchings took an absolute title to the joint property of both, having first executed a deed to the other a condition of defeasance. In such a case the onus devolves upon the party who insists that the contract was a conditional sale: (See *Edrington v. J. J. Marshall*, 356.) The contracts show upon their face, that Hutchings took title to secure the payment of the money and the interest that might accrue on the same. Such an arrangement is perfectly consistent with the idea of a mortgage, and though it may be doubted as to whether or not the absolute conveyance to Hutchings was intended to operate only as such, yet the rule is that in all such cases, the law will construe a contract to be a mortgage, because such a construction will be most apt to attain the ends of justice and prevent fraud and oppression: *Honore v. Hutchings, Ib.*, 687.

WAIVER.

A party to an action may waive a future contingent right. Thus, in ejectment, a party, by stipulation before trial, may waive the right to a second trial, which the statute would give him in case judgment in the first should be against him: *Ladd v. Hildebrand*, 27 Wis., 135.

WAR.

A letter written during the existence of the war of the rebellion, by a citizen of Indiana, to a citizen of Louisiana, can not take a case out of the operation of the statute of limitations: *Perkins v. Rogers*, 35 Ind., 124.

WILL.

A devise or bequest in favor of the wife, contained in the will of the husband, will never be construed by implication to be in lieu of dower. The design to substitute the one for the other, must be unequivocally expressed: *Bryant Adm'r. v. McCune*, 49 Mo., 546.

Digest of Recent Unreported Decisions of the Supreme Court of Tennessee, December Term, 1872.

ADVANCEMENT.

It is a rule of law that property given to a child will be presumed advancement, but this presumption may be rebutted by the recipient: *Morris*.

ATTACHMENT.

A bank is responsible as a natural person for maliciously suing out attachment: *Wheless v. Second National Bank*.

The plaintiff is entitled to an attachment under the first clause of our laws, if it appear that the defendant is a non-resident of the State, although he may be temporarily in the State at the time the attachment issues: *Bohn, Mack & Co.*

ATTORNEY.

An attorney has a lien upon the subject matter of the suit for his fees. The Court has the right to declare the lien, but not to determine the amount of the fee where the client is *sui juris*: *Perkins, by next friend, v. Perkins, et al.*

ATTORNEY AND CLIENT.

Where courts have jurisdiction to order references to Clerk and Master to ascertain the amount of the fee, in such reference the attorney and his former client occupy antagonistic positions, and the client must be notified as to all proceedings to determine the amount of the fee: *Perkins, by next friend, v. Perkins et al.*

BANKRUPTCY.

If the Court granting the discharge in bankruptcy has no jurisdiction of the case, its action is a nullity. And this want of jurisdiction may be interposed by the Court to defeat the effect of the discharge. *Hennessee vs. Hills*

State Courts will not take judicial notice of proceedings in bankruptcy. A creditor of a person who has filed his petition, but not obtained his discharge from the bankrupt court, refuses to prove his claim under the proceedings in bankruptcy. If he elects to proceed in a State Court, he not having submitted to the jurisdiction of the bankrupt court, the latter court can not restrain him from proceeding in the State Court. *Ward v. Tunstol*.

It is too late to file the plea of bankruptcy after the cause has come to the State Court as its jurisdiction is simply appellate. *Ib.*

But the judgment of this Court will be without prejudice to the bankrupt. He may have a remedy in the bankrupt court, or by original proceedings in the State Court. *Ib.*

BELLIGERENT RIGHTS.

Belligerent rights can not be assumed or employed at the will of the private citizen, or the civil authorities of a city, and neither will be excused upon the plea of

act would have been performed by the military authorities: *Ensley v. Mayor and City Council of Nashville*.

CHANCELLOR DE FACTO.

The decrees of a Chancellor *de facto* are valid, if parties elect to bring their causes to trial before him without interposing the plea of *coram non iudice*: *Gold v. Fite*.

CHANCERY PLEADING.

A bill filed for the purpose of having judgments obtained upon garnishment enjoined, should make it appear affirmatively that there was no judgment and execution upon which the proceeding in garnishment was based. Otherwise, they will be presumed to exist in favor of the proceedings before the magistrate: *Carroll v. Parkes*.

CHANCERY JURISDICTION.

One Chancery Court has the power to enjoin the execution based upon the judgment of another Chancery Court, which judgment was obtained by motion without notice: *R. B. Douglass and C. E. Boddie, adm'r, v. W. H. Joiner et al.*

The Chancery Court can, at the instance of a tax payer, enjoin the issuance by the County Court, of bonds as subscription to stock in a railroad company, when the election held to pass upon such subscription was not in accordance with law: *Winston et al. v. Tenn. & Pacific R. R. Co.*

The Chancery Court can incidentally inquire into the validity of an election which proposed to authorize the County Judge or Court to issue bonds to a railroad, where tax payers of the county had filed a bill to enjoin the issuance of such bonds: *Ib.*

CHANCERY SALE.

The confirmation of a sale made by a Clerk and Master has no retrospective effect, and the purchaser is entitled to possession only from the date of the confirmation: *Armstrong v. McClure*.

COMMON CARRIER.

The proximate and not the remote cause of the loss of goods is the one by which courts are to be governed in determining the liability of common carriers for injury to or loss of goods being transported by the carrier: *Lamont & Co. v. The N. & C. R. R. Co., and five other cases*.

The simple detention, unmixing with fault or negligence on the part of the carrier, will not render him liable for the loss of goods occasioned by the act of God: *Ib.*

But if the carrier failed to exercise due diligence to prevent injury to the goods by act of Providence, then the carrier would be liable for their loss: *Ib.*

CONSIDERATION.

Where suit is instituted upon a note given for depreciated currency, the defense of partial failure of consideration can not be made. It is simply inadequacy of price. Partial failure of consideration applies more properly to a case where there are two distinct considerations and one of them fails: *Griffin & Woodward v. Simmonds et al.*

CONSTITUTION.

The constitution of 1870 was not a new constitution, but in all its main features was a re-enactment of the constitution of 1834: *Gold v. Fite*.

The schedule of the constitution of 1870 vacated all offices, which were to be filled by the appointment of the Judges of courts, at the first term of the court after the election in August, 1870; but if, on account of any irregularity, such term of the court were not held, then such office was to become vacant in a reasonable time thereafter. And the court holds that August, 1871, would be a reasonable time by which it would be vacated by constitutional limitation. *Ib.*

CONSTITUTIONAL DISTANCE.

In construing constitutional distances the straight or air line rule will be used and observed in measuring distance between two points. This decision is based on constitutional or statutory provisions, and the court expressly refuse to introduce the rule will be adopted in reference to distances in private contracts. *Mason v. Counties v. Trousdale County*.

CONSTABLE.

The law presumes that an executive officer performs his duty, and executes all process coming to his possession, and there must be positive proof to rebut this presumption: *Brien & Peyton v. Dennis Connor*.

CONSTRUCTION OF STATUTES.

In construing statutes courts will look to legislative intention, and not to the verbiage of the statute. The Legislature did not intend by the first section of the Act of July 5th, 1870, to construe the ninth section of the Act of December, 1870, that the first section of the Act of July, 1870, should be an independent and operative provision of the laws of the State: *Arrington, Trustee, v. Cotton*.

Where two bills are before the Legislature at the same time, and pass upon their first and final reading, within two days of each other, it is not to be presumed that one act was intended to repeal the other: *Ib.*

That sub-sec. 5 of sec. 1166 of the Code is not applicable to the movement of an engine in the yard of the company as between the company and one of its employees. So held at Jackson, in case of *M. & L. R. R. v. Robinson*, but in this case it does not appear from the proof whether the injury was sustained by an employee of the company: *L. & N. R. R. Co. v. Connor, Adm'r.*

CONTESTED ELECTION.

To contest the election of a judicial officer does not create a vacancy in the office, and in such a case the Governor has no constitutional warrant to appoint a successor to fill the office during the pendency of the contest: *Gold v. Fite*.

CONTRACTS.

Where the vendor takes the note of the vendee, payable in a particular article or specific articles, the vendor can not abandon the contract and bring suit for the value of the article sold: *Woodfolk v. Pratt*.

This would be to permit the substitution of a new and different liability upon the contract springing out of the contract of the parties: *Ib.*

CONVERSION.

If upon tender of freight and demand of goods the railroad company refuses to deliver them unless the party gives a clear receipt for all demands, the company is liable for a conversion: *N. & C. R. R. Co. v. Whele*.

CORAM NOBIS.

That complainant might have had his remedy by writ of error *coram vobis* does not deprive him of his remedy by injunction: *Douglas et al. v. Joiner et al.*

The mere granting of a fiat for the issuance of a writ of error *coram vobis* does not constitute the commencement of an action; the petition must be filed and the bond given before suit is commenced; and if the year expire before this is done, the action is barred: *Ib.*

CORPORATION.

Under the attachment laws malice is to be inferred from the acts of a corporation from the acts of a natural person: *Wheless v. Second National Bank*.

COUNTY TRUSTEE.

The first section of the Act of July 5th, 1870, is not repealed by the Act of July 7th, 1870, and, as a consequence, the County Trustee is the officer upon whom the law imposes the duty of paying the claims of teachers of common schools: *Arrington, Trustee, v. Cotton*.

COUNTY COMMISSIONERS OF TURNPIKES.

The Act of January 9th, 1865, supersedes the power of the Commissioners under the Turnpike Act of 1835: *White's Creek Turnpike Co. v. Marshall et al.*

It was not a part of the duty of the Commissioners to enforce the Act of January 1865; their power was derived solely from the Act of 1835: *Ib.*

If the Commissioners insisted upon exercising the powers granted by the Act of 1835, Chancery had jurisdiction to grant complainant relief against their acts: *Ib.*

COUPONS.

In order to recover upon a coupon which has been severed from a bond, it is not necessary to make demand and have it protested: *Mayor, &c., of Nashville, v. First National Bank*.

And such coupon will bear interest from maturity, without demand, unless it be shown that funds were provided for its payment: *Ib.*

COVENANTS.

Where, in a written contract for rent, the landlord binds himself to make certain repairs, and the tenant to pay part of the crop, etc., such a contract does not belong to the class of covenants in which the performance of one depends upon the prior performance of the other, but to the class of covenants where either party may recover damages from the other for breach of covenant: *Smith v. Wiley*.

DAMAGES.

In estimating the damages for felling and removing timber from land, an element that may be taken into consideration by the jury is the use to which the land may have been appropriated in the future, as if it were intended as a location for residences, the injury for divesting such a place of its grove will be one of the ingredients of the damages sustained. In such a case the mere value of the wood for fuel would not compensate the owner for the injury he has sustained: *Enely et als. v. Mayor, &c., of Nashville*.

The shock to the feelings of the wife and children by the sudden death of the father by the wrongful act or act of omission of the defendant, is not a proper element for the consideration of the jury in estimating the damages resulting to the plaintiff by the death of her intestate: *N. & C. R. R. Co. v. Mary Stephens, Adm'r.*

The statutes make the bodily pain and mental anguish of the person injured one of the elements of damages, but its provisions do not extend to the mental anguish of the next of kin: *Ib.*

The jury, in assessing damages against a railroad for an injury to the person of another, may take into consideration the negligence or imprudence of the person injured: *L. & N. R. R. Co. v. Connor, Adm'r.*

ELECTION FOR SUBSCRIPTION TO RAILROAD.

That the County Court can not legally order an election to decide upon the question of subscription to a railroad, unless the railroad desiring such an order of election has complied with all the requirements of section 1145 of the Code: *Winston et als. v. The T. & P. R. R. Co.*

That under our laws an election ordered and held in substantial conformity to the

statute is a condition precedent, and if not performed the County Court has no power to make the subscription: *Ib.*

EVIDENCE.

The burden of proof to show that written notice had been given to the judgment debtor in possession, rests upon the plaintiff in ejectment: *Denning v. Stephens*.

The burden of proof is upon a railroad company to show that their road and machinery were in good condition at the time of an accident: *L. & N. R. Co. v. Connor, Adm'r.*

The railroad must show that all precautions were observed, otherwise they are liable, although the jury might be of the opinion that the accident would have happened if the precautions had been observed: *Ib.*

Where it is necessary in a suit to give the history of an entire transaction composed of several acts, all that was said or done by either of the principals explanatory of any of the acts is admissible evidence, if not as a part of the *res gestæ*, at least as a part of the history of the transaction: *Third National Bank v. Robinson & H.*

A statement of a party made subsequent to the performance of an act and explanatory of it, is admissible in rebuttal of testimony introduced by the other party to show that he had made statements or performed acts different or inconsistent with his testimony in Court. And it is immaterial whether these statements were introduced before or after the testimony that it was intended to rebut: *Ib.*

Where the agent of a mutual insurance company prepares an application for insurance, which is signed by the insured, and there are errors in the answers furnished by such agent, parol testimony is admissible to show that the insured made statements to the agent, but by mistake the agent inserted an erroneous statement: *Planters' Ins. Co. v. Sorrels.*

Testimony that was competent at the trial below, can not be assigned as error, because the laws of evidence have been changed since the trial: *A. Burroughs et als.*

All the presumptions of the law are in favor of the acts of an officer, and to require a party denying their validity to prove their invalidity, is not requiring him to prove a negative: *Childress v. Harrison.*

A wife after the death of her husband will not be permitted to testify as to a fact or event that transpired during her coverture with her deceased husband: *Werner & Brown, Ex'rs., v. Maufin and wife.*

EXECUTORS AND ADMINISTRATORS.

Testamentary representatives who have full power under the will of the testator to dispose of real estate, can not exercise such power where the assets, real and personal, are not sufficient to satisfy the creditors of the estate: *Morehead, Adm'r., v. Deimer et als.*

It is the duty of such personal representative to file an insolvent bill, and to make a *pro rata* distribution of the assets among the creditors of the estate: *Ib.*

And a sale of such real estate made in pursuance of a power in a will is not valid unless the proceeds are applied ratably to all the creditors in this State. Where there is not a *pro rata* distribution of such proceeds, any creditor may file a bill to set aside the sale and have such sale set aside: *Ib.*

The payment of a debt due the deceased to his widow, and the farther payment of a debt due from the deceased on which his creditor was surety, out of such assets due the deceased, are acts which will not make the creditor of the deceased, an executor *de son tort*. *Alexander v. Kelsa.*

The personal representative of an infant has a right of action against a railroad which has caused the infant's death: *L. & N. R. R. Co. v. Connor*.

The right of a personal representative to retain his claim out of the estate in his hands will be lost, unless exercised in a settlement with the County Court within two years: *Neal & Wisdom v. Wisdom*.

Section 2326 of the Code does not affect the lien of judgments obtained in the lifetime of the deceased.

Because of the condition of affairs during the late war, personal representatives who did not strictly comply with the law, will be excused for such non-compliance: *Morris v. Morris*.

And such representatives who have received in good faith, Confederate money in discharge of debts, due the estate of the deceased will only be charged for the value of such money when received, and then only when he has appropriated it to his own use: *Ib.*

In the case of *Harrison v. Henderson* (manuscript opinion), it is held that the statute of limitation is imperative as to the time allowed administrators for final settlement, from the time Courts were closed until they were re-opened, and it follows that administrators are not liable for interest during this period: *Ib.*

In case of contested will it is the duty of the executors to produce the original will in court for probate in solemn form; if they fail to do so, they can not move to dismiss the case, because the will is not produced, and thus prevent a trial of the case on an issue of *deustavit vel non*. *Wisner & Brown, Ex'rs, v. Maupin and wife*.

If a person contracts as executor, and does not limit his liability to pay out of the assets of the estate, it is a personal obligation without limitation: *Patterson v. Craig*.

That the personal representative only has the right of action against the person causing the death of the deceased: *Bledsoe et als. v. Stokes et als.*

EXEMPTION.

The Legislature can not prohibit a person from disposing of his property at will. It follows that the owners of property exempt from execution under our laws, have the absolute power of disposition over the property so exempted: *Cox v. Ballentine*.

FEME COVERT.

To omit the words "voluntarily and understandingly" from the certificate of an officer who has taken the privy examination of a *feme covert* to a deed renders it absolutely void: *Wright by next friend v. Dufield et als.*

A *feme covert* can pass her title in real estate only by joint deed with her husband, her title bond is worthless. She is not subject to a decree of specific performance: *Ib.*

Where a *feme covert* seeks the rescission of a sale of real estate, her prayer will be granted, on condition that the purchase money she has already received will be declared a lien on the property: *Ib.*

GOVERNOR'S POWER TO FILL JUDICIAL VACANCIES.

So much of section 315 of the Code as empowers the Governor to appoint a suitable person to fill a vacancy in a judicial office until a successor could be elected, had not been repealed by the Legislature on the 26th day of July, 1871, nor is it in conflict with section 5, article 7 of the Constitution, which provides that there shall be no special election to fill judicial vacancies: *Gold v. Fite*.

If there is a state of facts that authorize the Governor to make an appointment to fill a vacancy in a judicial office, and he make the appointment but rests upon wrong or improper grounds, the appointment will, nevertheless, be held valid.

In the absence of controlling authority, the Supreme Court will not declare the act of the Governor made in pursuance of his right and duty, merely because he predicated his action upon the wrong state of facts: *Ib.*

GOVERNMENT DE FACTO.

The Confederate States were a government *de facto*, with belligerent rights and the power to enforce those rights. And the citizens of its territory owed obedience to its authority in civil and legal matters as a duty: *Bank of Tennessee v. Davis, Adm'r.*

And such belligerent rights could only be exercised through its citizens; and contracts entered into between them for war supplies, were valid: *Ib.*

HOMESTEAD.

The homestead provided by law for the heads of families, is not liable for debts contracted since the 27th of March, 1868. And since the passage of this act the husband has not had the power to make a conveyance of his real estate so as to defeat his right of homestead, unless the wife gives her consent and joins in the conveyance: *Kennedy v. Stacey.*

INSURANCE.

To avoid a policy of insurance by change of use or occupancy of the property insured, the insurer must show that such change increases the risk: *Planters Ins. Co. v. South.*

JUDGMENTS.

Confederate money paid to the clerk of a Court to be applied in satisfaction of a judgment in such Court, and invested in Confederate bonds by the Clerk under the orders of Court, is a good payment, though the execution docket had not been filed: *Hill v. Tyler.*

When a Court has jurisdiction of the parties and subject matter of a case, the decree can not be attacked collaterally unless void on its face. Under section 10 of the Code, a purchase made by witness in a proceeding by which the sale is annulled, is void: *Starkey v. Hammer.*

JUDGMENT LIEN.

An appeal does not release the judgment lien, but simply suspends it. The issuance of execution from the Supreme Court against the debtor, and his compliance with the appeal bond, which was not levied or satisfied, operate as a release of the judgment lien: *Baugess v. Partee, et als.*

LAGER BEER.

Lager beer is not a spiritous or vinous liquor, within the meaning of section 4861, of the Code, which prohibits the sale of spiritous and vinous liquors on Sunday. And it follows that an indictment will not lie for the sale of lager beer on Sunday: *Henry Fritz v. the State.*

LEGISLATURE.

The Legislature has no constitutional power to construe a statute. An act passed for this purpose is absolutely null and void: *Arrington, Trustee, v. C.*

The Legislature can not delegate to a Trustee, to whom a bank has made an assignment, the power to fix a time within which the creditors of the bank shall present their claims for payment, or forever thereafter be barred: *Fogg et als. v. Bank et als.*

When the Legislature has the power to pass an act, it has the power by a subsequent act to suspend the operation of the provisions of the former act: *White Creek T. P. Co. v. Marshall et als.*

LEVY.

The levy of an execution on sufficient personal property to satisfy the judgment is an inchoate or conditional satisfaction of the debt, which may be defeated by the action of the law, by means of *certiorari* and *supersedeas*: *Fry v. Manlove.*

When the levy is annulled by the action of the law, the officer ceases to be liable for the debt, and it again becomes the debt of the original parties: *Id.*

The act of December 12, 1866, to enable banks that have or may make assignments to make distributions among creditors, is not a statute of limitations: *Fogg et als. v. Union Bank et als.*

LANDLORD'S LIEN.

The lien of the landlord upon the crop raised upon his land is inchoate, and may be made a specific lien from the date of contract of rent, by attachment and judgment against the tenant, though the crop may have passed into the possession of an innocent purchaser: *Phillips v. Maxwell.*

But if the landlord proceed against the purchaser for the value of the property instead of the property itself, he can not recover if the purchaser had no notice of the lien: *Id.*

EQUITABLE MAXIMS.

Anderson filed a bill to enjoin a summary judgment obtained against him by Binford, which judgment is decided to be void. But it transpires during the proceedings of the cause, that Anderson had received \$2,000 to be applied to the claim upon which the summary judgment had been taken, which he failed to apply. The Court decide on the principle that he who seeks equity must do equity, that Anderson can not have a perpetual injunction against said summary judgment until he has accounted to Binford for the \$2,000 so received: *Anderson v. Binford.*

MISCEGENATION.

Where parties are permitted to enter into the contract of marriage by the laws of our State, the contract will be regarded as valid, although solemnized in accordance with the laws of a State or nation whose laws differ from ours. But if the parties are rendered incapable of entering into such a contract by our laws, the marriage wherever solemnized, will be held void by our Courts. Otherwise we might have in our midst the Mormon with his numerous wives, or the Turk with his harem, or parties within the prohibited degrees of consanguinity, living together as man and wife, because their marriage was valid where solemnized: *State v. Bell.*

NEW TRIAL.

That two of the jurors that rendered the verdict in the cause on the second trial had been on the jury that rendered a verdict on the first trial of the cause, will not authorize this Court to grant a new trial in the cause. As it was the fault of the party complaining, that proper objection to them was not made in time, or a good reason for not doing so assigned: *Warren et als. v. Blanton.*

If a juror give to the jury additional evidence after they have retired, this will authorize this Court to grant a new trial in the cause. And the affidavit of a juror will be received and considered to show that such evidence was given: *Wade v. Ordway, et als.*

To recall the jury and repeat to them a portion of the charge; the jury not asking it, is an error for which this Court will grant a new trial. This case falls

within the rule announced in *Swagerty v. Cotton*: 1 Heiskell, 202, *Grass Frierson*.

PUBLIC AGENTS.

The purchasing agent of a government, known to be such by the persons whom he deals, is not personally liable on any of the contracts he makes for and in behalf of the government in his official capacity. *Brazelton v. & Gordon*.

PARTIES.

The officer who has in his possession an execution to enforce, is such a material party as to give the Court jurisdiction of the cause. *Douglas & Boddie, A. Joiner, et als.*

PLEADING.

An action on the case will lie against a bank for maliciously suing out an attachment. *Wheless v. Second Nat. Bank*.

The mere use of the words fraud and deceit are not sufficient allegations upon which to introduce proof of fraud. Some allegations of fraudulent acts must be made in the bill. *Martin v. Burroughs, et als.*

In suing upon coupons it is not necessary to make proof of the bonds from which they are cut. *Mayor &c., of Nashville, et als., v. Potomac In. Co.*

PRINCIPAL AND AGENT.

A public agent is not responsible for an injury caused by his negligence, the principal alone being responsible. But such an agent is responsible for an injury caused by his misfeasance: *Erwin v. Davenport*.

If the agent of a railroad uses the instruments placed in his hands to injure another person, the company will be responsible for such wrongful act of the agent, to the extent of the actual damages sustained, but not for exemplary damages. *Sloans v. N. & C. R. R. Co.*

RAILROADS.

The duty imposed upon the employees of a railroad by section 1166 of the Code is paramount to the duty that such persons owe to the passengers traveling on the trains of such railroad: *L. & N. R. R. Co. v. Connor, Adm'r.*

That sub. sec. 5 of section 1166 of the Code is not applicable to the movement of an engine in the yard of a company, as between the company and one of its employees, so held at Jackson, in case of *M. & T. R. R. Co. v. Robinson*; but it applies to this case, as it does not appear from the facts in the case that the person injured in the yard of the company, or that he was an employee of the railroad. *M. & T. R. R. v. Connor, Adm'r.*

RESULTING TRUST.

If a person without fraud is induced to part with his property at a nominal price by the promise of the purchaser that he would convey it to a sister of the vendor, who was the wife of the vendee, the failure of vendee without fraud, to execute the conveyance in pursuance of his parol promise will not establish a resulting trust in favor of the woman. And the parol promise being obnoxious to the statute against frauds, the heirs of the vendee will take the property: *Perkins v. Chairs*.

In order to create a resulting trust, the money must be advanced by the vendor for the whole or a definite amount of the property, as a third or a half:

SUMMARY JUDGMENT.

Sub-section 2 of Sec. 3589 of the Code limits the jurisdiction of Courts of record on motions in favor of sureties to the Court of the County where judgment was rendered or the county where one of the defendants reside. Section 3632 of the Code applies solely to the jurisdiction of Justices of the Peace, and does not enlarge the jurisdiction of Courts of Record: *Anderson v. Binford*.

This summary remedy being in contravention of the common law, judgments so taken must show on their face that courts rendering them have jurisdiction, otherwise they will be void: *Ib*.

SHERIFF'S DEED.

1. A deed executed by a sheriff in pursuance of a sale made by his predecessor in office, of land in which the execution debtor was in possession at the time of levy and sale, and which deed recites that due notice by written advertisement was given of the day of sale, does not raise the prima facie presumption that the written notice required by Sec. 3042 of the Code had been given: *Dunning v. Stephens*.

2. A deed which does not show on its face that such personal notice was given to the judgment debtor in possession is void upon its face: *Ib*.

TAXES.

The purchaser of real estate at a judicial sale is entitled to have the taxes already assessed upon such property paid out of the purchase money. And this even after the confirmation of the sale: *Childress v. Vance*.

TORTS.

A corporation is liable for the tortious acts of its agents when it has received the benefit of such acts: *Enslly v. Mayor and City Council of Nashville*.

TURNPIKES.

Turnpike companies are liable to indictment if they fail to keep their roads in the condition required by their charters; but they may defeat the indictment by showing that they have complied with the provisions of the Act of Jan. 9, 1865: *Whites Creek Turnpike Co. v. Marshall, et als*.

USURY.

The general usury laws common or applicable to natural persons are applicable to Banks, unless their charters attach other penalties: *Perkins v. Watson, Trustee*.

WILLS.

The Circuit Court may try an issue of *devisavit vel non* on a copy of the original will, the correctness of the copy not being in dispute: *Wisner & Brown, executors, v. Maupin and wife*.

WITNESSES.

It is not error in the judge to place under the rule the parties to a suit when they are to be witnesses in the cause: *Ib*.

Digest of Recent Reports of the Law of Bankruptcy.

[An Act to Establish a Uniform System of Bankruptcy, etc., passed March 2, 1898.]

ATTORNEY.

Attorneys of Bankrupt, as far as services rendered prior to adjudication concerned, are general creditors of the Bankrupt, and must prove their debt in that form. To permit the assignee to pay for services rendered after adjudication prior to his election, it must be satisfactorily proven that they were properly and necessarily rendered for the purpose of benefitting or preserving the estate of the bankrupt in the interest of the general creditors: *Jaycox v. Green*, 7 B. R., 173.

ATTACHMENT FOR CONTEMPT.

An attachment for contempt in violating injunction will lie, where judgment was rendered by the court before his debtor was adjudicated a bankrupt, but was not obtained from selling the property, after adjudication, by an injunction of the U. S. Bankruptcy Court: *In re Atkinson*, 7 B. R., 173.

ASSIGNEE.

1. A petition for the removal of an assignee alleged, among other things, that he had neglected to take proper measures to secure the bankrupt's property; that he had refused to pay taxes on the bankrupt's real estate; and that he had allowed it to be sold to pay the same.

Held, that the allegations of the petition were duly proven, and gross neglect was a duty on the part of the assignee shown: *In re Morse*, 7 B. R., 56.

2. Order entered removing the assignee and directing him to pay out of the funds within twenty days the cost of presenting and prosecuting the petition for removal: *Ib.*

3. It is well settled that until an assignee in bankruptcy elects to accept the office of assignee, he does not become liable for rent accruing after the adjudication of bankruptcy when an assignee occupies the leased premises independently of the lease. For such occupation, this occupation is not evidence of such an election: *Thompson v. Choate*, 7 B. R., 28.

ACT OF BANKRUPTCY.

A person can not commit an act of Bankruptcy while insane; but if, while sane, he has committed such an act, he may be made bankrupt upon a petition after he has become insane. Whether he can obtain a discharge, *quære*. 6 B. R., 276.

BANK.

A bank has the right, under the bankrupt laws, to set-off the amount of a draft against the deposit of an insolvent debtor; hence, when the amount of the draft exceeds the amount of the deposit, the assignee in bankruptcy is not liable for the excess of the deposit: *In re Petrie*, 7 B. R., 332.

CONFESSION OF JUDGMENT.

1. The preference upon a judgment note is not obtained when the warrant of execution is given, but when the judgment upon it is entered: *Godson v. Neihoff*.

2. A confession of judgment, if otherwise invalid under the 35th section of the Bankrupt Act, can not be valid for any such reason as that the power of attorney bore date more than four or six months before any actual transfer: *Hood v. Harper*, 5 B. R., 58.

3. Where an execution must necessarily stop the debtor's business, the execution creditor, as a rule, has reason to believe the debtor insolvent, and in general intends what, if not prevented, would be a fraud upon the provisions of the Bankrupt Act. *Ib.*

4. Where creditor executes the dominant power (vested in him by virtue of a judgment note,) at a time when he has reason to believe the debtor insolvent, such entering of judgment is an act of bankruptcy participated in by the creditor, and all advantages obtained under it are in violation of the law: *Godson v. Neihoff*, 5 B. R., 56.

DISCHARGE.

1. The provision of the 21st section of the Bankrupt Act, for staying any suit or proceeding to await the determination of the Court in Bankruptcy, on the question of discharge, does not apply to a corporation which can never receive such discharge by the terms of said act: (See 37.) *Meyer v. Aurora Ins. Co.*, 7 B. R., 191; *Allen v. Soldiers' Dispatch Co.*, 7 B. R., 176.

2. Where the proceeds of a bankrupt's assets exceeded the amount of the claims proved against the estate, but after the payment therefrom of costs and expenses, the amount remaining may not equal fifty per centum of said claims;

Held, that the bankrupt was not entitled to a discharge under the amendatory Act of July 27, 1869, unless the assent of a majority of his creditors, in number and value, were shown: *In re Vinton*, 7 B. R., 138; *In re Frederick*, 3 B. R., 117; Judge Blatchford in 3 B. R., 177. *Per contra*: *In re Kahly*, 6 B. R., 189.

3. A bankrupt who has otherwise conformed to the requirements of the Bankrupt Law, is entitled to a discharge, if, at the time he filed his petition in bankruptcy, he was possessed of property fairly worth fifty per cent. of the debts proved against his estate, upon which he was liable as principal debtor. The fact that the property was sold below what it was actually worth, should not prejudice his right to a discharge, for the reason that, after the appointment of an assignee, the bankrupt had no further control over the property or its disposal, all of which was left to the skill and discretion of the assignee: *Lincoln v. Cherry*, 7 B. R., 335.

4. A bankrupt should have the full benefit of his property when he seeks a discharge, and ought not to be made the creature of circumstances over which he has had no control: *Ib.*

5. Where a certificate of discharge was duly granted to a bankrupt, and within the limited term of two years two creditors, whose debts were provable against the said bankrupt's estate, applied to have his discharge annulled and set aside, on the ground that he had willfully sworn falsely in his affidavit annexed to his schedule of creditors and liabilities, in that, having knowledge of the residence of said creditors and his liability to them, he did not include in his schedules the names of said creditors or said claim;

Held, that the creditors finding the act as charged proven, and that the same was a particular fact concerning their debts, and that the creditors had no knowledge of the commission of said act until after the granting of the discharge, judgment must be given in favor of the creditors, and the discharge is therefore set aside and annulled: *In re Herrick*, 7 B. R., 341.

6. Persons who buy on credit and sell again, in such wise as to be merchants or traders, must keep such books in relation to their business as will furnish an intelligible account to their creditors of the state and course of their business transactions. If they neglect to do this, a discharge must be refused: *In re Garrison*, 7 B. R., 287.

DEED OF TRUST.

After the commencement of proceedings in bankruptcy, a creditor secured by a trust can not enforce his security by sale, without the permission of the Court; and any sale so made will, upon proper application, be set aside: *Kehr*, 7 B. R., 97.

DOWER.

1. As against the assignee in bankruptcy, the wife is not barred or estopped from claiming dower, by reason of her having joined her husband in a deed which was set aside as to creditors, and which for this reason has been set aside at the instance of the assignee: *Cox v. Wilder*, 7 B. R., 241.

2. A similar principle was applied to the homestead exemption right under the statute of Missouri, which, as against the assignee in bankruptcy, was held to be forfeited by the making of a fraudulent conveyance, set aside at the instance of the assignee: *Ib.*

3. As against the assignee, the property is still the bankrupt's: *Ib.*

EXEMPTION.

The assignee in bankruptcy may designate a sum of money as necessary for the support of the bankrupt and his family: Section 17 of the Bankrupt Act: *In re Hay*, 7 B. R., 344-46.

FRAUDULENT DEED.

1. When a deed, fraudulent as to prior creditors of the grantor, is set aside, the creditors prior and subsequent share in the fund *pro rata*: *Smith v. Kehr*, 7 B. R., 139.

2. When a deed is set aside as made in fraud of creditors of the bankrupt, the bankrupt retains his homestead right, which passes to his grantee: *Smith v. Kehr*, reversing *Cox v. Wilder*, 5 B. R., 443.

3. The well settled doctrine under the statute of fraudulent conveyances is that a voluntary deed is not fraudulent merely because there is some indebtedness existing at the time, but that it is void as to existing creditors only, when made by a person in such embarrassed circumstances as not to leave ample margin in favor of existing creditors: citing *Woodson v. Toole*, 19 Mo., 340; *Potter v. McDowell*, 31 Mo., 62; *Pratt v. Pratt*, 6 B. R., 139; *Soloman v. Bennett*, 1 Conn., 525; *Duhure & Co. v. Young*, 3 B. R., 139; *Sexton v. Wheaton*, 8 Wheat., 250; *Hinde's lessee v. Longworth*, 11 Wheat., 355 *et seq.*, 13 How., 82. See, also, authorities cited as to voluntary conveyances void against subsequent creditors.

FRAUD IN PROCURING GOODS.

A. was arrested on a charge of fraud in procuring goods in violation of the bankrupt law. On a hearing before a United States Commissioner it was shown that the accused was a keeper of a small store, without means or reputation as a merchant, who had succeeded by skillful representations in buying a large quantity of goods, most of which were disposed of in less than a month's time, so that the United States Marshal took possession of the store but a small portion of the goods could be found. No books of account or other evidence showing to whom the goods were sold, or in whose hands placed, were found. The accused remained silent and explained nothing.

Held, that probable cause was shown, and the accused was held for appearance before the court: *U. S. v. Thomas*, 7 B. R., 188.

FRAUDULENT PREFERENCE.

1. A creditor who receives money and merchandise from his debtor, knowing he is insolvent, is guilty of obtaining a fraudulent preference; hence, if he

surrender to the assignee the property and money so received, he can not prove his claim, and must pay the costs of the proceedings by the assignee, to compel him to relinquish his preference: *Forsyth v. Murtha*, 7 B. R., 174.

2. When the execution creditor knew that his debtor was unable to pay his debts at maturity, he was put upon inquiry at once, and must be adjudged chargeable with the knowledge he would have thus obtained, and guilty of receiving a preference with reasonable cause to believe his debtor insolvent. The claim can not be proved until the creditor has surrendered to the assignee the advantage obtained by his judgment: *Ib.*, 174.

HUSBAND AND WIFE.

Where, upon an agreement for a separation between husband and wife, the husband makes a settlement upon the wife, and she, through a trustee, consents to relinquish her dower, and to indemnify the husband against her debts, the deed is for a consideration valuable in law, and will be good as against creditors; but if the parties come together and set aside the articles of separation, although stipulating that the settlement shall stand, the consideration of the deed ceases to be valuable and becomes voluntary, and as against creditors will be void: *Smith v. Kehr*, 7 B. R., 87.

INSOLVENCY.

By insolvency, as used in the Bankrupt Act, when applied to traders and merchants, is meant inability of a party to pay his debts as they become due in the ordinary course of business: *Toof v. Martin*, 6 B. R., 49. (See *Reasonable Cause*, 2.)

JUDGMENT.

1. The procuring or suffering a judgment to be obtained against him by a debtor, without giving any warrant of attorney, is not in itself an act of bankruptcy; yet, if he directly or indirectly assist or facilitate the obtaining of judgment on which an execution has followed, this may be evidence in support of an allegation that he has committed an act of bankruptcy by procuring or suffering his property to be taken in execution: *In re T. Woods*, 7 B. R., 126.

2. The United States District Court sitting in Bankruptcy has power to enjoin the sheriff of a State Court, or parties litigant therein, from proceeding to sell property levied upon by virtue of a writ of execution issued out of such Court upon a judgment obtained therein before proceedings in bankruptcy were commenced: *In re Mallory*, 6 B. R., 22.

JUDGMENT CREDITOR.

If a debtor was insolvent, or contemplated insolvency, at the time of a levy by an execution creditor, and refrained from going into voluntary bankruptcy, it was suffering property to be taken on legal process; and if he knew that he was insolvent, or contemplated insolvency, when so suffering property to be taken in execution in a manner that necessarily resulted in giving a preference to the execution creditor, then he intended such preference in judgment of law, and committed an act of bankruptcy: *In re Dibble*, 2 B. R., 185.

LIEN.

Where an assignee in bankruptcy applied to the U. S. District Court for leave to sell the bankrupt's real property, subject to certain specified liens, and an order was made accordingly, and after the sale the assignee reported to the court that he had sold the property free from all other liens except those named;

Held, that a lien of a *bona fide* judgment creditor who was not named in any of the proceedings, was not destroyed, for the reason that the said court did not ratify such sale as "free from all liens, except those mentioned," although confirming the report of the assignee: *In re McGilton et al.*, 7 B. R., 294

MORTGAGE.

1. Mortgages and bills of sale of personal property which are void as to creditors by the statute of frauds of the State where the transactions occur, are void and of no title as against the assignee in bankruptcy: *Edmondson v. Hyde*, 7 B. R., 1.

2. If a bankrupt does not desire to assert any claim to property that is exempt from execution under the law of the State where he resides, a mortgagee of that property can not claim it as against the assignee in bankruptcy: *Ib.*

PROMISSORY NOTE.

1. Any creditor may have his debtor adjudged a bankrupt, although the debt had remained unpaid for a period of fourteen days and which constitutes a claim in bankruptcy, was paid before the filing of the petition, if the debtor's whole estate was not paid at the commencement of bankruptcy proceedings: *Eas v. C.* 7 B. R., 133.

2. A secret partner, under these circumstances, THOUGH ENTIRELY SOLVABLE, having committed no other act of bankruptcy, may be adjudged a bankrupt by a petition filed against the two partners: *Ib.*

PARTNERSHIPS.

1. Notes drawn by one partner in the firm name, apparently in the course of the partnership business, without *mala fides* or actual knowledge by the holder of the authority or intended misapplication, entitle the holder to their allowance from the estate of the firm: *Bush v. Crawford*, 7 B. R., 299.

2. A member of a partnership offered B. for indorsement his individual notes representing, however, that they were to be used for purposes of the firm. B. indorsed the same, A. at B.'s suggestion, substituted the firm notes, which B. paid and subsequently paid and became their holder.

Held, that although it appeared that the notes, after said indorsement, were used by A. to pay his separate indebtedness, and in fraud of his co-partner, B. might sue against the firm, there being no evidence of bad faith or actual knowledge by the firm of the intended fraud: *Ib.*

3. An insolvent firm made a transfer to a creditor in fraud of the provisions of the Bankrupt Act. One of the partners died, and within four months of the death the transfer, the surviving partners, but not the firm, were adjudged bankrupts.

Held, that the assignee could not recover the property transferred by the firm to a partnership creditor, by way of a preference, or otherwise: *Withrow v. A.* 7 B. R., 339.

4. A petition was filed by the assignee of a bankrupt firm showing that a creditor, who held notes signed by the firm and by an individual member thereof, proved his claim against the firm estate and also against that of the individual member, the petitioner praying that such creditor might be compelled to elect the estate against which he will receive his dividend.

Held, that the creditor was entitled to the advantage gained by his credit and diligence, and could receive dividends from both estates: *Emery v. Canal* 7 B. R., 217.

5. A note given in an individual transaction of one of the bankrupts in the manner for the benefit of the firm, though signed in the firm name, is not a claim in bankruptcy against the joint estate: *Forsyth v. Murtha*, 7 B. R., 175.

6. A joint individual bond of all the partners is not a claim against the firm estate: *In re Welb & Co.*, 2 B. R., 183.

7. A debt incurred by the members of a firm as individuals, even in a man-

the firm is to profit, will not, in case of bankruptcy of the firm let the person to whom the debt was incurred come in for a dividend upon the assets of a firm: *Forsyth v. Woods*, 11 *Wallace*, 484.

8. A joint request made by all the individual members of a firm soliciting B. to become a surety of one of them on an administration bond does not create a liability of the firm, even though a joint representation was made to him that they intended to make the administration a matter of partnership business and profits. Hence, upon the firm being subsequently declared bankrupt, B. has no debt provable against their firm estate: *Forsyth v. Woods*, 5 B. R., 79.

9. Where the original consideration of a claim passed to a partnership, but the obligations given for the same were executed by all the individual members of the firm as such;

Held, that the creditor holding such obligations are the creditors of the individual members and are entitled to a credit out of the individual estates. The bankrupts elected in executing the obligations to bind their separate estates, and it can not now be insisted that the original consideration shall be inquired into: *Ib.*

PREFERENCE:

Preference in a bankrupt court must either rest on a lawfully acquired lien, created before the filing of a petition by or against the bankrupt, or else the consideration therefor must have been unequivocally in aid of the assignee after adjudication, or in aid of the proceedings in bankruptcy: *In re Newman & Co.*, 7 B. R., 15 ; See 6 B. R., 579.

PUBLICATION.

Where a statute requires a notice to be published once a week for four weeks, in order to a strict compliance therewith, an interval of seven days must intervene between each publication. Hence, a notice published on the 11th, 21st and 27th of January, and on the 1st and 10th of February, does not comply with the terms of the statute, and any proceedings based on such publication, must fail on account of this irregularity: *King v. King*, 7 B. R., 279.

POWER OF UNITED STATES DISTRICT COURT.

The United States District Court has no power to make general rules in bankruptcy, such power being vested elsewhere; that is in the Supreme Court of the United States by section 10 of the Bankrupt Act: [See Rule 32.] *Kennedy v. Macintosh*, 7 B. R., 337.

RAILROADS.

1. A petition was filed in the United States Circuit Court for the Southern District of Alabama, praying that a receiver might be appointed to take charge of the property of a Railroad Company. *Held*, that inasmuch as the Circuit Court of the United States for the Southern District of Mississippi, and the Chancery Courts of Alabama, Georgia and Tennessee, had acquired jurisdiction, and as their powers were just as large, and they were just as competent to administer full relief, this Court will not interfere: *A. & C. R. R. Co. v. Jones*, 7 B. R., 145.

2. Railways fall within the designation of business or commercial corporations and are clearly within the operation of the United States Bankrupt Act of March 2, 1867: *Winter v. J. M. & N. C. R. C.*, 7 B. R., 289.

3. A railroad company is neither a banker, broker, merchant, trader or manufacturer, or miner, within the meaning of these words as used in the Bankrupt Law, and can not be proceeded against in Bankruptcy for the mere suspension or non-payment, however long continued, of its commercial paper: *Ib.*

An unexecuted agreement by a company to transfer its stock can not be into an act of Bankruptcy: *Ib.*

4. The issue at par, of the stock of a company, not heretofore issued in of a *bona fide* debt, would not be a fraud on the creditors. If, however, it by the company as paid up stock, lawfully acquired, the transfer thereof ors, under such circumstances as would give them an illegal preference, would act for which the company could be proceeded against, under the Law: *Ib.*

REASONABLE CAUSE.

1. A debtor is held to be insolvent when he is unable to discharge his debts in the usual course of business; hence, when creditors have accounts overdue several months, and finally have to resort to legal measures for the collection of them, must be considered as having reasonable cause to believe their debtor insolvent. Money collected under these circumstances, must be paid to the debtor's assignee in Bankruptcy, together with interest and costs of proceedings instituted by them for the recovery: *Stranahan v. Gregory*, 4 B. R., 142.

2. The word insolvency as used in the United States Bankrupt Act, must be construed to mean not an absolute inability to pay debts at some future time, upon the liquidation and winding up of the party's affairs; but a present inability to pay debts in the ordinary course of business; although this inability to pay be not sufficient to compel an absolute suspension: *In re Rison*, 4 B. R., 114.

3. A creditor has reasonable cause to believe a debtor, who is a trader, to be insolvent, when such a state of facts is brought to the creditor's notice respecting the affairs of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business: *et als. v. Martin*, 6 B. R., 49.

REGISTER.

1. A Register holding provisionally a Court of Bankruptcy should discharge his opinion upon questions which may arise during the course of the proceedings. If exceptions be taken to his provisional decision, he should certify the questions to the court: *In re Reskirt*, 7 B. R., 729.

2. Where an examination of a witness is ordered before a Register and the witness refuses to answer a question propounded to him, the Register should order the witness to answer. If the witness still refuses, the Register should report his conduct to the court: *Ib.*

3. The Register has power to make the order under Sec. 26 of the bankruptcy act. It is not necessary to apply to the court for such order: *In re Pioneer Co.*, 7 B. R., 100.

4. As to the scope of an examination before a Register under Sec. 26: *Ib.*

5. The Register in charge has power to order the assignee to furnish him with the necessary information as to funds in his hands: *Clark v. Bissinger*, 6 B. R., 100.

SECURED CREDITOR.

Where a creditor who has security upon the bankrupt's property, has made a claim for his debt, and his proof of claim is contested, the better, if not the only proper course of submitting the question in controversy, is to move the Court to expunge the claim made by the secured creditor, or to apply for a re-examination of the claim: *general order No. 30: Jaycox v. Green*, 7 B. R., 303.

NOTES.

regret that Book Notices have been crowded out by press of other matter from number of the REVIEW.

call the attention of our subscribers to the advertisement of Messrs. Kay & Co., in the present number of this REVIEW. We particularly commend this for the exceedingly tasty and handsome manner in which their publications are put up, and for their uniform courtesy and obligingness in all business transactions.

Chicago Legal News, ably edited by Mrs. Myra Bradwell, has our heartiest commendation for its enduring success. There is no other weekly legal publication in the country that we consider more valuable, and we cordially recommend it to all of our readers who wish to be constantly informed as to the course of adjudication and the state of the legal market in the Western States.

Among our exchanges there is none we welcome more gladly than the *Pacific Law Reporter*, published in San Francisco. It is ably edited, and full of interesting digests of the latest American decisions.

Reports of Cases in Law and Equity determined in the Supreme Court of the State of Iowa. By Edward H. Stiles, Reporter. Vol. XI. Being vol. XXXII of the *Reports*. Published by the Reporter. Ottumwa, Iowa. 1872.

One of our exchanges unite in bestowing very high, and, as we deem, deserved, commendation upon the execution of the Iowa Reports. The Bench and Bar will find many important principles investigated and decided in this volume, and their satisfaction of them very greatly facilitated by the skill and care with which the Reporter presents them.

UNREPORTED STATE DECISIONS.—We have made arrangements by which we will enter the decisions of different State Supreme Courts will be digested and printed in the REVIEW long in advance of their publication in any other form. Lawyers who wish to obtain the latest legal intelligence from home and foreign sources, and who wish to keep abreast with the current and progress of legal adjudication, should subscribe to the REVIEW at once. We are doing all in our power to make it an indispensable to every practitioner and student.

Western Jurist, published at Des Moines, Iowa, is a monthly Law Magazine of great value. Its general editor, the Hon. Chester C. Cole, is at present one of the Justices of the Supreme Court of Iowa, and a jurist of well-known culture and ability. He is assisted by Audley W. Gazzam, of New York city, whose reputation as author of standard law works on Bankruptcy, is known to all practitioners in the country. The Hon. E. H. Stiles, the present able Reporter of the Supreme Court of Iowa, is also among the number of its editors. We commend it to our readers as worthy their patronage.

AN IRISH BULL.—At the Commission Court, in Dublin, a peep-o'-day-b name of Thaddy Kiernan, was tried and found guilty of stealing two cows. defense, Thady protested his innocence, and, with a most rueful countenance, denied the charge of having *carried off* the cows, "for," said he, "one of them w and the other *cow* followed him."

We have received the following exchanges:

The Western Jurist, Des Moines, Iowa.
Bench and Bar, Chicago.
Luzerne Legal Register, Wilkesbarre, Pa.
National Bankruptcy Register, New York.
Insurance Law Journal, St. Louis.
American Journal of Insanity, Utica, New York.
Lancaster Bar, Lancaster, Pa.
Local Courts' and Municipal Gazette, Toronto, Canada.
Solicitors' Journal and Reporter, London.
Chicago Legal News, Chicago.
The Law News, St. Louis.
The Daily Register, New York.
Pacific Law Reporter, San Francisco.
Legal Gazette, Philadelphia.
Pittsburgh Legal Journal, Pittsburgh, Pa.
Albany Law Journal, Albany, N. Y.
American Law Record, Cincinnati.
American Civil Law Journal, New York.

"Be brief, be pointed; let your matter stand,
 Lucid in order, solid, and at hand;
 Spend not your word on trifles, but condense;
 Strike with the mass of thoughts, not drops of sense;
 Press to the close with vigor once begun,
 And leave, (how hard the task!) leave off when done;
 Who draws a labor'd length of reasoning out,
 Puts straws in lines for winds to whirl about;
 Who draws a tedious tale of learning o'er,
 Counts but the sands on ocean's boundless shore;
 Victory in law is gain'd as battles fought,
 Not by the numbers, but the forces brought;
 What boots success in skirmishes or fray,
 If rout and ruin following close the day?
 What worth a hundred posts maintain'd with skill,
 If these all held, the foe is victor still?
 He who would win his cause, with power must frame
 Points of support, and look with steady aim:
 Attack the weak, defend the strong with art,
 Strike but few blows, but strike them to the heart;
 All scattered fires but end in smoke and noise,
 The scorn of men, the idle play of boys.
 Keep, then, this first great precept ever near,
 Short be your speech, your matter strong and clear,
 Earnest your manner, warm and rich your style,
 Severe in taste, yet full of grace the while;
 So you may reach the loftiest heights of fame,
 And leave, when life is past, a deathless name."

C H A R T

OF THE

Southern Law Review Union.

Take Notice.—No one has authority from us to receive or receipt for subscriptions. respectfully request those of our subscribers who have failed to remit us, to do so at once—either by money order or check, at our risk. The next number of the Review and Chart will contain names, and be sent to those only whose subscriptions shall have been paid. So many of our subscribers in sending remittances have requested individual receipts, that we concluded to ignore the method of receipting indicated in our last number.

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"	Rivers & Conner,	"
"	James A. Thomas, Jr.,	"
Lee,	James Dodson,	Smithville.
Liberty,	J. W. Farmer,	Hinesville.
"	Walter A. Way,	Walthourville.
Lowndes,	Whittle & Morgan,	Valdosta.
"	G. T. Hammond,	"
"	A. H. Smith,	"
Lumpkin,	Weir Boyd,	Dahlonega.
Macon,	R. G. Ozier,	Montezuma.
"	W. H. Reese,	Marshallville.
"	Thos. P. Lloyd,	Oglethorpe.
McDuffie,	Paul C. Hudson,	Thomson.
"	H. C. Roney,	"
"	W. T. O'Neal,	"
McIntosh,	D. A. McIntosh,	Darien.
Merriweather,	John W. Park,	Greenville.
Milton,	Thomas L. Lewis,	Alpharetta.
Mitchell,	W. C. McCall,	Camilla.
"	James H. Spence,	"
Monroe,	R. P. Trippe,	Forsyth.
Morgan,	J. C. Barnett,	Madison.
Murray,	Wm. Luffman,	Spring Place.
Muscogee,	Ingram & Crawford,	Columbus.
"	Raphael J. Moses,	"

GEORGIA.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
scogee,	Louis F. Garrard,	Columbus.
"	D. H. Burts,	"
"	Alonzo A. Dozier,	"
"	W. A. Little,	"
erton,	L. B. Anderson,	Covington.
"	Clark & Pace,	"
ethorpe,	E. C. Shackelford,	Lexington.
ilding,	S. L. Strickland & N. N. Beall,	Dallas.
ree,	John C. Nicholls,	Blackshear.
e,	H. Green,	Zebulon.
"	J. A. Hunt,	Barnesville.
k,	Batt Jones,	Van Wert.
"	Thos. W. Dodd,	Rock Mart.
"	A. T. Williamson,	"
aski,	Charles C. Kibbee,	Hawkinsville.
"	C. Anthony,	"
"	L. C. Ryan,	"
"	O. C. Horne,	"
"	A. C. Pate,	"
"	John H. Martin,	"
nam,	Wm. A. Reid,	Eatonton.
amond,	A. R. & H. G. Wright,	Angusta.
"	Frank H. Miller,	"
"	Jos. P. Carr,	"
"	W. F. Eve,	"
"	John S. Davidson,	"
"	W. A. Walton,	"
"	Marcellus P. Foster,	"
"	A. C. Holt,	"
"	James S. Hook,	"
dale,	J. W. Early,	Conyers.
"	W. D. Atkinson, Jr.,	"
ey,	Hudson & Wall,	Ellaville.
ven,	Geo. R. Black,	Sylvania.
"	W. L. Mathews, Jr.,	Ogeechee.
"	Henry C. Kittles,	Sylvania.
ilding,	D. N. Martin,	Griffin.
"	J. M. Campbell,	"
pter,	Hawkins & Guerry,	Americus.
"	John R. Worrill,	"
ot,	W. A. Little,	Talbotton.
ferro,	James F. Reid,	Crawfordsville.
or,	O. M. Colbert,	Butler.
ell,	R. F. Simmons,	Dawson.
ir,	John McDearmid,	McRea.
nas,	Hopkins & Hopkins,	Thomasville.
"	K. T. MacLean,	"
p,	Speer & Speer,	LaGrange.
"	W. W. Turner,	"

COUNTY.	NAME.	Post Office.
Troup,	Thos. A. Whitaker,	LaGrange.
Upson,	John I. Hall,	Thomaston.
"	Thomas Beall,	"
Walker,	J. C. Clements,	Lafayette.
Walton,	John W. Arnold,	Monroe.
Washington,	S. G. Jordan,	Sandersville.
Wayne,	W. C. Remshart,	Jesup.
Whitfield,	T. R. Jones,	Dalton.
Wilkes,	W. M. Reese,	Washington.
"	Robert Toombs,	"
Wilkinson,	F. Chambers,	Irvinton.
IDAHO.		
Nez Perce,	Jasper Rand,	Lewiston.
ILLINOIS.		
Adams,	G. W. Fogg,	Quincy.
Alexander,	Allen, Mulkey & Wheeler,	Cairo.
Cass,	J. Henry Shaw,	Beardstown.
Champaign,	Sweet & Lothrop,	Champaign.
Clark,	Whitehead & Hare,	Marshall.
Cook,	E. A. Otis,	Chicago.
DeWitt,	Palmer & Ferguson,	Clinton.
Douglass,	R. B. Macpherson,	Tuscola.
DuPage,	W. G. Smith,	Wheaton.
Effingham,	S. F. Gilmore,	Effingham.
Fayette,	J. W. Ross,	Vandalia.
Ford,	A. M. McElroy,	Paxton.
Franklin,	Alfred C. Duff,	Benton.
Greene,	Burr & Wilkinson,	Carrollton.
Hamilton,	R. S. Anderson,	McLeansboro.
Hancock,	David Mack,	Carthage.
Iroquois,	Blades & Kay,	Watseka.
Jefferson,	C. H. Patton,	Mt. Vernon.
Kane,	Wheaton, Smith & McDole,	Aurora.
Kankalee,	C. A. Lake,	Kankalee.
Knox,	J. B. Boggs,	Galesburg.
"	G. C. Lanphere,	"
Lawrence,	T. P. Lowry,	Lawrence.
Lee,	A. K. Trusdell,	Dixon.
Livingston,	Pillsbury & Lawrence,	Pontiac.
McLean,	Stevenson & Ewing,	Bloomington.
Macon,	I. A. Buckingham,	Decatur.
Macoupin,	John N. McMillan,	Carlinville.
Marshall,	A. J. Bell,	Lacon.
Mason,	Wright & Cochran,	Havana.
Massac,	Edward McMahon,	Metropolis.
Mercer,	McCoy & Clokey,	Aledo.
Montgomery,	W T. Coale,	Hillboro.
Morgan,	Wm. Brown,	Jacksonville.

ILLINOIS—Continued.

COUNTY.	NAME.	POST OFFICE.
oultrie,	W. G. Patterson,	Sullivan.
eoria,	Thomas Cratty,	Peoria.
tiatt,	S. R. Reed,	Monticello.
ope,	Thomas H. Clark,	Golconda.
utnam,	Frank Whiting,	Granville.
ichland,	F. D. Preston,	Olney.
ock Island,	W. H. Gest,	Rock Island.
. Clair,	Kase & Wilderman,	Belleville.
ngamon,	N. M. Broadwell,	Springfield.
"	C. M. Morrison,	"
nelby,	Hess & Stephenson,	Shelbyville.
azewell,	John B. Cohrs,	Pekin.
union,	Hugh Andrews,	Jonesboro'.
ermillion,	Wm. A. Young,	Danville.
arren,	William Marshall,	Monmouth.
ayne,	James A. Creighton,	Fairfield.
oodford,	George H. Kettele,	Metamora.

INDIANA.

llen,	Combs, Miller & Bell,	Fort Wayne,
oone,	Ralph B. Simpson,	Lebanon.
ass,	Frank Swigot,	Logansport.
larke,	S. L. Robison,	Charlestown.
lay,	Rose & Stephenson,	Bowling Green.
rawford,	N. R. Peckinpauth,	Leavenworth.
aviess,	W. J. Mason,	Washington.
earborn,	Adkinson & Roberts,	Lawrenceburg.
ecatur,	Gavin & Miller,	Greensburg.
eKalb,	James E. Rose,	Auburn.
lkhart,	R. M. Johnson,	Goshen.
loyd,	Huckeby & Huceby,	New Albany.
ountain,	Nebeker & Cambern,	Covington.
ranklin,	Chas. Moorman,	Brookville.
ibson,	Wm. M. Land,	Princeton.
rant,	G. T. B. Carr,	Marion.
amilton,	Evans & Stephenson,	Noblesville.
ancock,	James L. Mason,	Greenfield.
arrison,	Wolfe & Stockalager,	Corydon.
enry,	Wm. Grose,	New Castle.
oward,	J. H. Kroh,	Kokomo.
untington,	Ulysses D. Cole,	Huntington.
ackson,	Long & Long,	Brownstown.
asper,	Thomas J. Spittler,	Rensselaer.
ay,	James W. Templer,	Portland.
efferson,	Wilson & Wilson,	Madison.
knox,	J. S. Pritchett,	Vincennes.
aGrange,	C. U. Wade,	LaGrange.
ake,	T. S. Fancher,	Crown Point.
aPorte,	E. G. McCollum,	LaPorte.

INDIANA—Continued.

COUNTY.	NAME.	POST OFFICE.
Madison,	James H. McConnel,	Anderson.
Marion,	Robert N. Lamb.	Indianapolis.
Monroe,	James B. Mulky,	Bloomington.
Morgan,	J. V. Mitchell,	Martinsville.
Ohio,	S. R. & D. T. Downey,	Rising Sun.
Perry,	Charles H. Mason,	Cannelton.
Pike,	Charles H. McCarty,	Petersburg.
Porter,	Thomas J. Merrifield,	Valparaiso.
Poesy,	Spencer & Loudon,	Mt. Vernon.
Randolph,	Browne & Thompson,	Winchester.
Scott,	W. C. Price,	Lexington.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Sullivan,	John T. Gunn,	Sullivan.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith	Bluffton.

IOWA.

Benton,	John Shane,	Vinton.
Boone,	C. W. Williams,	Boonesboro.
Cass,	J. T. Hanna,	Atlantic.
Cerre Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clark,	John Chaney,	Oceola.
Clinton,	Albert L. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Duzee & Henderson,	Dubuque.
Fayette,	Ainsworth & Millar,	West Union.
Greene,	Jackson & Potter,	Jefferson.
Guthrie,	Wm. Elliott,	Panora.
Hancock,	James Crow,	Ellington.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	T. W. & John S. Woolson,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	George D. Woodin,	Sigourney.
Lee,	Frank Allyn,	Keokuk.
Linn,	J. M. Preston & Son,	Marion.
Lucas,	E. B. Woodward,	Chariton.
Madison,	Leonard, Mott & Leonard,	Winterseat.
Marion,	Anderson & Collins,	Knoxville.
Marshall,	Parker & Rice,	Marshall.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Phillips & Phillips,	Des Moines.
Pottawatomie,	Baldwin & Wright,	Council Bluffs.
Poweshiek,	L. C. Blanchard,	Montezuma.

IOWA—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Scott,	Stewart & Armstrong,	Davenport.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Milligan,	Afton.
Capello,	E. L. Burton,	Ottumwa.
"	Edward H. Stiles,	"
Warren,	Bryan & Seevers,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Corydon.
Webster,	J. F. Duncombe,	Fort Dodge,
Woodbury,	Isaac Pendleton,	Sioux City.

KANSAS.

Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Chisholm,	Horton & Waggener,	Atchison.
Clinton,	John Foster,	Great Bend.
Curbon,	W. J. Bawden,	Fort Scott.
"	E. F. Ware,	"
"	A. A. Harris,	"
Deer,	W. T. Galliher,	Eldorado.
East,	S. N. Wood,	Cottonwood Falls.
Effey,	Fearle & Stratton,	Burlington.
"	J. Cox,	"
Empfan,	Sidney Tennent,	Troy.
Guglas,	A. J. Reid,	Lawrence.
Hanklin,	A. Franklin,	Ottawa.
Hickson,	Wm. Henry Dodge,	Holton.
"	A. M. Crockett,	Netawaka.
Jerson,	W. E. Stanley,	Oskaloosa.
Leavenworth,	Clough & Wheat,	Leavenworth City
Leon,	W. T. McCarty,	Emporia.
Lami,	James Kingsley,	Paola.
Lorris,	A. J. Hughes,	Council Grove.
Lawnee,	James M. Spencer,	Topeka.

KENTUCKY.

Ballard,	F. M. Jenkins,	Blandville.
"	Thos. P. Hays,	Milburn.
Barren,	Smith & Son,	Glasgow.
Beth,	Nesbitt & Gudgell,	Owingsville.
"	D. S. Trumbo,	Bethel.
Bone,	Jas. B. Finnell,	Verona.
Byrd,	Ireland & Hampton,	Ashland.
Cutler,	B. L. D. Guffy,	Morgantown.
Dwelling,	F. W. Darby,	Princeton.
"	C. T. Allen,	"
Elaway,	R. D. Brown,	Murray.
Farther,	J. R. Botts,	Grayson.

KENTUCKY—Continued.

COUNTY.	NAME.	POST OFFICE.
Carter,	Wm. Bowling,	Grayson.
"	E. B. Wilhoit,	"
Christian,	Ritter & Syper,	Hopkinsv.
"	Wood & Gaines,	"
Clarke,	W. M. Beckner,	Winchest.
Daviess,	G. W. Ray,	Owensbor.
"	I. P. Washburn,	"
Fayette,	Wm. C. P. Breckenridge,	Lexington.
"	Evan P. Graves,	"
"	George E. Billingsley,	"
"	Charles R. Williams,	"
Fleming,	A. E. Cole,	Flemings.
Floyd,	E. G. H. Harris,	Prestonsb.
"	Millin H. May,	"
"	Robert S. Friend,	"
Franklin,	T. N. & D. W. Lindsey,	Frankfor.
"	Drane & Chinn,	"
Fulton,	T. O. Goalder,	Hickman.
Garrard,	Jas. A. Anderson,	Lancaste.
"	Geo. Denny, Jr.,	"
Grant,	W. T. Simmonds,	Williams.
"	O. D. McManama,	"
Grayson,	Thomas E. Ward,	Litchfield.
Green,	Wm. B. Allen,	Greensbu.
"	Jeff. P. Henry, Jr.,	"
Greenup,	B. F. Bennet,	Greenup.
"	George T. Halbert,	"
"	George E. Roe,	"
Hancock,	Eldred E. Pate,	Hawesvi.
Hart,	George T. Reed,	Munford.
Henderson,	Charles Eaves,	Henders.
"	A. J. Anderson,	"
Henry,	Buckley & Buckley,	New Cas.
Hickman,	F. M. Ray,	Clinton.
"	Silvertooth & Son,	"
"	N. P. Moss,	"
"	John M. Brummal,	Columbu.
Jefferson,	W. O. Watts,	Louisvil.
"	L. H. Noble,	"
"	Gasley, Yeaman & Reinecke,	"
"	R. & L. Buchanan,	"
"	Easton & Callaway,	"
"	St. John Boyle,	"
"	E. W. C. Humphries,	"
"	D. W. Armstrong,	"
"	G. P. Arbegust,	"
"	Lee & Rodman,	"
"	Alex. Willey,	"
"	D. W. Sanders,	"

KENTUCKY—Continued.

COUNTY.	NAME	POST OFFICE.
erson,	Andrew Barnett,	Louisville.
"	Robert W. Hays,	"
"	B. H. Young,	"
"	Boone & Boone	"
"	Ward & Ward,	"
"	W. W. Bradley,	"
"	Duke & Richards,	"
"	B. H. Allen,	"
"	James A. Beattie,	"
"	T. & J. Caldwell,	"
"	Buford Twyman,	"
"	A. Winston,	"
"	Russell & Helms,	"
amine,	H. A. Anderson,	Nicholasville.
nson,	J. Frew Stewart,	Paintsville.
"	Greenville Lagrave,	"
ton,	Milton L. Roberts,	Covington.
"	L. E. Baker,	"
"	J. E. Hamilton,	"
"	John P. Harrison,	"
"	S. A. Hagerty,	"
ox,	F. P. Stickley,	Barboursville.
"	W. Herndon,	"
ne,	John W. Gore,	Hodgenville.
ington,	Bush & Bush,	Smithland.
"	John L. Murray,	"
ran,	A. G. Rhea,	Russellville.
on,	Dan. B. Caseidy,	Eddyville.
goffin,	D. D. Sublett,	Salysersville.
Cracken,	Houston & Houston,	Paducah.
"	Edward T. Bullock,	"
"	J. B. Husbands,	"
Lean,	S. J. Boyd,	Calhoun.
"	Geo. A. Prentice,	"
ade,	Kincheloe & Lewis,	Brandenburg.
"	Wm. Alexander,	"
nifee,	W. S. Pierce,	Frenchburg.
calfe,	John W. Compton,	Edmonton.
ntgomery,	John Jay Cornelison,	Mount Sterling.
rgan,	John T. Hazelrigg,	West Liberty.
cholas,	Isaac M. Chism,	Carlisle.
io,	E. Dudley Walker,	Hartford.
"	McHenry & Hill,	"
"	Harrison D. Taylor,	"
ham,	J. W. Clayton,	Lagrange.
en,	Wm. Lindsay,	Owentown.
"	Perry & Strother,	"
ndleton,	Perry F. Bonar,	Falmouth.
well,	A. C. Daniel,	Stanton.

KENTUCKY—Continued.

COUNTY.	NAME.	Post
Pulaski,	W. H. Pettus,	Somers
Rock Castle,	James G. Carter,	Mt. Vernon
Russell,	J. A. Williams,	Jamestown
Shelby,	Erasmus Frazier,	Shelby
Taylor,	D. G. Mitchell,	Campbell
Todd,	J. H. Lowry,	Elkton
Trigg,	Jno. S. Spiceland,	Cadiz.
"	W. L. Fuqua,	Canton.
Trimble,	Jacob Yeager,	Bedford
Union,	John S. Geiger,	Morgan
Warren,	Bates & Wright,	Bowling
"	Hines & Porter,	"
"	James H. Rose & T. W. Campbell,	"
Washington,	Richard J. Browne,	Springfield
Webster,	A. Edwards,	Dixon.
"	M. C. Givens,	"
Wolfe,	A. H. Quillin,	Campbell
Woodford,	Turner & Twyman,	Versailles

LOUISIANA.

Ascension,	R. N. Sims,	Donaldson
Assumption,	Hiram H. Carver,	Napoleon
Avoyelles,	Irion & Thorpe,	Marks
Baton Rouge,	George W. Buckner,	Baton Rouge
"	Henry Avery,	"
Caddo,	J. L. & H. H. Hargrove,	Shreveport
"	Levisse, Ashton & Blanchard,	"
"	T. F. Bell,	"
"	Duncan & Moncure,	"
"	J. H. Kilpatrick,	"
Caldwell,	Thos. E. Meredith,	Columbia
"	Arthur H. Harris,	"
Carroll,	Daniel B. Gorham,	Lake Plaquemine
Catahoula,	Smith & Boatner,	Harrison
Claiborne,	Robt. T. Vaughn,	Homer.
"	J. S. Young,	"
"	Drayton B. Hayes,	"
"	James W. Wilson,	"
East Feliciana,	Thos. A. Moore,	Clinton.
"	Frank Hardesty,	"
"	D. J. Wedge,	"
Franklin,	W. W. Campbell,	Winnsboro
"	Wells & Corkern,	"
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine
Iberia,	Robert S. Perry,	New Iberia
"	L. H. Montanye,	"
"	U. S. Haase,	"
"	Wm. F. Schwing,	"
"	Jos. A. Breaux,	"

LOUISIANA—Continued.

NAME.

POST OFFICE.

Graham & Smith,
Hamlett & Kidd,
Wm. Mithoff, Jr.,
Conrad Debaillon,
Thomas L. Winder,
J. S. Goode,
J. Tyson Lane,
Newton & Hall,
Morgan & Newton,
Sylvester G. Parsons,
Jack & Pierson,
Morse & Dranguet,
Sam. C. Reid,
Canonge & Cazabat,
R. G. Harris,
Richard DeGtay,
A. A. Atocha,
A. B. Cunningham,
Race, Foster & E. T. Merrick,
James Ligan,
J. W. Kerr,
Peter J. Kramer,
Sam'l R. & C. L. Walker,
G. H. Braughn,
Henry C. Dibble,
John M. Bonner,
Robert L. Preston,
Armand Lartigue,
T. E. Paxton,
Luke W. Conerly,
Wells & Williams,
H. P. Wells,
James H. Muse,
Joseph M. M. Moore,
J. F. Knox,
Felix Voorhies,
DeBlanc & Tournet,
Reeve Lewis,
E. L. Whitney,
John B. Winder,
J. L. Belden,
Barrett & Trimble,
J. & S. D. McEnery,
Richardsons & McEnery,
R. G. Cobb,
Samuel J. Powell,
A. B. George,
W. R. Roberts,

Vernon.
"
Carrollton.
Vermillionville.
Thibodeaux.
"
Tallulah.
Bastrop.
"
"
Natchitoches.
"
New Orleans,
45 Carondelet Street.
New Orleans,
24 Exchange Place.
New Orleans,
23 Commercial Place.
New Orleans,
P. O. box 1172.
New Orleans.
"
"
"
New Orleans,
31 Commercial Place.
New Orleans,
34 Exchange Alley.
New Orleans,
61 Camp Street.
New Orleans,
Lock Box 274.
New Orleans.
New Orleans,
125 Gravier Street.
New Orleans,
43 Carondelet Street.
Point a la Hache.
Coushatta.
"
Rayville.
Delhi.
Greensbury.
Opelousas.
"
St. Martinsville.
"
St. Joseph.
"
Houma.
"
Farmerville.
Monroe.
"
"
St. Francisville.
Minden.
Winnfield.

MAINE.

COUNTY.
Kennebec,
Knox,
Oxford,

NAME.
Joseph Baker,
Geo. H. M. Barrett,
H. Upton,

P.
August
Rockp
Norwa

MARYLAND.

Anne Arundel,
Baltimore,
“
Cecil,
Charles,
Frederick,
Queen Anne's,
St. Mary's,
Talbot,

Randal & Hagner,
John Thompson Mason,
Daniel Clarke,
John E. Wilson,
S. Cox, Jr.,
Wm. P. Maulsby, Jr.,
John B. Brown,
Combs & Downs,
C. H. Gibson,

Annap
Baltim
“
Elkton
Port T
Frede
Centr
Leona
Easto

MICHIGAN.

Allegan,
Barry,
Bay,
Calhoun,
Houghton,
Huron,
Ingham,
Isabella,
Macomb,
Marquette,
Oakland,
Oscoda,
Saginaw,
St. Clair,
St. Joseph,
Shiawassee,
Tuscola,
Wayne,

Arnold & Stone,
Wm. H. Hayford,
C. H. Denison,
Alvan Peck,
Ball & Chandler,
Richard Winsor,
Wm. H. Pinckney,
Fancher & Hopkins,
Edgar Weeks,
Maynard & Ball,
O. F. Wisner,
F. J. Russel,
Gaylord & Hanchett,
Atkinson Brothers,
R. W. Melendy,
E. Gould,
J. P. Hoyt,
Meddaugh & Driggs,

Alleg
Hastin
Bay C
Albio
Foug
Port
Lans
Moun
Mt. C
Marq
Ponti
Hart
Sagin
Port
Cent
Owas
Caro
Detro

MINNESOTA.

Dodge,
Martin,
Mower,
Ramsey,
Stearns,
Steele,
Winona,

G. B. Cooley,
M. E. L. Shanks,
G. W. Cameron,
S. M. Flint,
L. A. Evans,
A. C. Hickman,
Simpson & Wilson,

Mant
Fair
Aust
St. P
St. C
Owat
Wino

MISSISSIPPI.

Amite,
“
Attala,
“
Bolivar,
Benton,

George F. Webb,
James R. Galtney,
Campbell & Anderson,
D. C. Wasson,
George T. Lightfoot,
Kimbrough & Abernathy,

Libe
“
Kosc
“
Nebi
Ashl

MISSISSIPPI—*Continued.*

NAME.	POST OFFICE.
Roane & Roane,	Pittsboro'.
James Somerville,	Carrolton.
Keyes, Nelson & Bean,	"
W. B. Helm,	"
Lacy & Thornton,	Okalona.
D. B. Archer,	La Grange.
Brantley, Dunn & Holloway,	"
J. H. & J. F. Maury,	Port Gibson.
Wm. Sillers,	"
E. H. Stiles,	"
Evans & Stewart,	Enterprise.
S. H. Terrall,	Quitman,
James T. Rucks,	Friars' Point.
Wm. H. Hill,	Palo Alto.
Stone & Haley,	Hazelhurst.
Tim. E. Cooper,	"
L. O. Bridewell,	Beauregard.
Thos. H. Johnston,	Hernando.
J. F. Sessions,	Meadville.
A. S. Pass,	Grenada.
Jno. McInnis,	Vernal.
T. J. Humphries,	Handsboro.
Chas. F. Clint,	Jackson.
Sam'l M. Shelton,	Raymond.
George A. Smythe,	Jackson.
J. Z. George,	"
H. S. Hooker,	Lexington.
Allen & Dyson,	"
W. S. Farish,	Mayersville.
Street & Chapman,	Paulding.
Walter Acker,	"
J. J. Whitney,	Fayette.
Thomas Reed,	"
Ellis & Brame,	De Kalb.
Steel & Watts,	Meridian.
Thomas H. Woods,	"
K. R. Webb,	Brookhaven.
J. D. Williams,	Tupelo.
Clayton & Clayton,	"
J. D. Barton,	"
J. L. Finley,	Guntown.
Somerville & Yerger,	Greenwood.
Chrisman & Thompson,	Brookhaven.
Cassedy & McNair,	"
Leigh & Evans,	Columbus.
Geo. A. Ramsey,	"
Barry & Brame,	West Point.
S. M. Wook,	Canton.
George Harvey,	"

MISSISSIPPI.—Continued.

COUNTY.	NAME.	POST.
Madison,	John Handy,	Canton.
Marshall,	Wm. M. Strickland	Holly S.
"	Featherston, Harris & Watson,	"
Monroe,	John B. Walton,	Aberdeen.
"	Davis & McFarland,	"
"	Mason M. Cummings,	"
Oktober, beha,	Sullivan & Turner,	Starkville.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Rankin,	W. B. Shelby,	Brandon.
"	J. M. Jayne, Jr.,	"
Simpson,	M. A. Banks,	Westville.
Tallahatchee,	Bailey & Boothe,	Charleston.
Tippah,	Thompson & Falkner,	Ripley.
Tishomingo,	L. P. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
"	James T. Coleman,	"
"	Brien & Spears,	"
"	Catchings & Ingersoll,	"
"	John D. Gilland,	"
Washington,	Trigg & Buckner,	Greenville.
"	S. W. Ferguson,	"
"	Jno. F. Harris,	"
Wayne,	J. W. Boykin,	Winchester.
Wilkinson,	L. K. Barber,	Woodville.
"	T. V. Noland,	"
Winston,	W. S. Bolling,	Louisville.
Yalabusha,	Walthal & Gollady,	Grenada.
"	Geo. H. Lester,	Coffeeville.
"	B. H. Tabor & H. E. Ware,	Water Valley.
Yazoo,	Miles & Epperson,	Yazoo City.
"	A. M. Harlow,	"
"	Robert Bowman,	"
"	Andrews & Prewett,	"
"	Robert S. Hudson,	"

MISSOURI.

Adair,	Ellison & Ellison,	Kirkville.
"	W. L. Griggs,	"
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	James R. Williams,	Mexico.
"	Wm. O. Forrist,	"
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.
Bollinger,	A. C. Ketchum,	Marble Hill.
Boone,	John C. Richardson,	Centralia.
"	Odon Guitat,	Columbia.

MISSOURI—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Chanam,	J. W. & John D. Strong & J. C. Hedenberg,	St. Joseph.
"	Donaphan & Baldwin,	"
Atler,	Snoddy & Matthews,	Poplar Bluff.
Adwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Atroll,	B. D. Lucas,	Carrolton.
As,	H. Clay Daniel,	Harrisonville.
"	Samuel D. Benight & O. W. Byrum,	"
"	James Armstrong,	"
Atlar,	W. D. Hoff,	Stockton.
"	James T. Farrie,	"
Arariton,	Charles A. Winslow,	Brunswick.
"	Kinley & Kinley,	"
"	Charles Hammond,	"
Ark,	W. H. Robinson,	Cahoka.
"	James M. Asher,	"
"	Park Henshaw,	"
"	Edward T. Smith,	Alexandria.
Aty,	John T. Chandler,	Liberty.
Atnton,	Charles A. Wright,	Plattsburg.
Atle,	E. S. King & Bro.,	Jefferson City.
"	Alfred M. Lay,	"
Atper,	John Cosgrove,	Boonville.
Atlas,	Peter Wilson,	Buffalo.
Atviess,	Richardson & Ewing,	Gallatin.
"	James L. Davis,	"
Kalb,	Samuel C. Loring,	Maysville.
Atnt,	G. S. Duckworth,	Salem.
Atntry,	I. P. Caldwell,	Albany.
Atsane,	P. T. Simmons,	Springfield.
"	Frank H. Warren,	"
Atundy,	Daniel Metcalf,	Trenton.
Atrrison,	D. J. Heaston,	Bethany.
"	J. H. Phillebaum,	"
Atckory,	Charles Kroff,	Hermitage.
Atlt,	T. H. Parrish,	Oregon.
Atward,	J. M. Reid,	Fayette.
Atwell,	Wm. H. McCown,	West Plains.
"	Organ & Livingston,	"
Atn,	J. P. Dillingham,	Ironton.
Atckson,	Holmes & Dean,	Kansas City.
"	F. A. Mitchell,	"
"	Wm. B. Napton, Jr.,	"
"	C. J. Bower.	"
"	George W. Galvin,	"
"	John J. Crandall,	"
"	R. Orendorff,	"
"	John A. Ross,	"

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
Jackson,	John K. Cravens,	Kansas City.
"	W. W. Cooke,	"
Jasper,	Wm. Cloud,	Carthage.
"	Wm. H. Phelps,	"
"	D. A. Harrison,	"
"	A. L. Thomas,	"
Johnson,	N. H. Conklin,	Warrensburg.
"	N. Blackstock,	Knobnoster.
"	H. Martin Williams,	Holden.
Laclede,	J. T. Moore,	Lebanon.
Lafayette,	Ryland & Son,	Lexington.
Lawrence.	Washington Cloud,	Pence City.
Lewis,	F. W. Rash,	Monticello.
"	A. Hamilton,	La Grange.
"	Aaron D. Lewis,	Canton.
"	N. Rollins,	"
Linn,	A. W. Mullins,	Linneus.
"	Thomas Whitaker,	Bucklen.
"	Ell Torrance,	Linneus.
Livingston,	Collier & Mansur,	Chillicothe.
"	John M. Boyd,	"
Macon,	A. J. Williams,	Macon City.
"	John Shepperd,	"
Madison,	B. B. Cahoon,	Fredericktown.
Maries,	Johnson & Rittenhouse,	Vienna.
Marion.	Wm. P. Harrison,	Hannibal.
"	John L. Robards,	"
"	R. E. Anderson,	Palmyra.
McDonald,	A. H. Kennedy,	Pineville.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isaiah Latchem,	Oakhurst.
"	John S. Lumpkin,	Locust M.
Moniteau,	Moore & Williams,	Californi.
Monroe.	A. F. Livingston,	Monroe.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Ma.
Newton.	Jno. C. Trigg,	Neosho.
"	Jno. A. Wilson,	"
Osage.	S. Mosby,	Linn.
Pemiscot,	James Montgomery,	Gayoso.
"	John A. Averill,	"
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
"	C. H. Frost,	"
Pike,	Fagg & Dyer,	Louisian.
Platte,	James J. Hitt,	Weston.
Polk,	O. D. Knox,	Boliver.
"	James G. Simpson,	"

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
laski,	William Rollins,	Waynesville.
tnam,	Hyde & Christy,	Unionville.
lla,	E. W. Southworth,	New London.
"	John McGown,	"
ndolph,	Porter & Rothwell,	Huntsville.
line,	John W. Bryant,	Marshall.
ott,	J. H. Moore,	Commerce.
"	Marshall Arnold,	"
annon,	G. F. Chilton,	Pine Hill.
Francois,	F. M. Carter,	Farmington.
Genevieve,	Charles C. Rozier,	St. Genevieve,
Louis,	Lewis & Daniel, 571½ Chestnut St.,	St. Louis,
"	A. H. Bereman, cor. 4th & Olive,	"
"	Thos. B. Childress,	"
"	Ash & Smith, 314 Nor. 3rd. Street.	"
"	C. P. Ellerbe, 211 Nor. 3rd. Street.	"
"	Geo. W. Griffin,	"
"	N. H. Horner, 203 Pine Street.	"
"	Matthew O'Reilly, 324 Nor. 3rd. St.	"
"	Jno. F. Lee, Jr., 317 Pine St.	"
"	Theodore Hunt, 104 Nor. 4th St.	"
oddard,	Hicks & McKeon,	Bloomfield.
llivan,	S. F. Harvey,	Milan.
ney,	J. J. Brown,	Forsyth.
ernon,	J. K. Hansbrough,	Nevada.
"	Scott & Stone,	"
arren,	Frank T. Williams,	Warrenton.

MONTANA.

dgerton,	W. E. Cullen,	Helena.
adison,	Samuel Word,	Virginia City.

NEBRASKA.

as,	Maxwell & Chapman,	Plattsmouth.
ohnson,	Charles A. Holmes,	Tecumseh.
emaha,	Jarvis S. Church,	Brownsville.
atte,	Leander Gerrard,	Columbus.

NEVADA.

umboldt,	Patrick H. Harris,	Unionville.
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NEW HAMPSHIRE.

eshire,	E. M. Forbes,	Winchester.
illsboro,	G. Y. Sawyer & Sawyer Junior,	Nashua.

NEW JERSEY.

umberland,	Alex. H. Sharpe,	Millville.
sex,	John W. Taylor,	Newark.
ercer,	Leroy H. Anderson,	Princeton.
iddlesex,	James H. Van Cleef,	New Brunswick.

NEW JERSEY—Continued.

COUNTY.	NAME.	Post Office.
Monmouth,	Charles Haight,	Freehold.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Davis,	Somerville.
Sussex,	Robert Hamilton,	Newton.

NEW MEXICO.

Frank Springer,	Cimarron.
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NEW YORK.

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicottville.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabeth.
Franklin,	Horace A. Taylor,	Malone.
Fulton,	McCarty & Parke,	Gloversville.
Genesee,	J. G. Johnson,	Batavia.
Greene,	Rufus W. Watson,	Catskill.
Kings,	P. S. Crooke,	Brooklyn.
Livingston,	Geo. W. Daggett,	Nunda.
Monroe,	H. & G. H. Humphrey,	Rochester.
Montgomery,	J. D. & F. F. Wendell,	Fort Plain.
New York,	Broome & Broome,	New York.
"	Morrison, Lanterbach & Spingarn,	10 Wall St. New York.
"	Charles O'Connor,	200 Broadway New York.
"	Richard O'Gorman,	"
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
"	W. W. Oxx,	Bath.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	Merritt King,	Newfield.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

NORTH CAROLINA.

Alamance,	G. F. Bason,	Graham.
Alleghany,	E. L. Vaughan,	Gap Civil.
Anson,	R. Tyler Bennet,	Wadesboro.
"	John D. Pemberton,	"
Ashe,	Squire Srivett,	Jefferson.
Bertie,	James L. Mitchell,	Windsor.
"	Joseph B. Cherry,	"
Bladen,	R. H. & C. C. Lyon,	Elizabeth.
Buncombe,	A. T. & T. F. Davidson,	Ashville.
"	J. G. Martin,	"

NORTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE:
Buncombe,	Wm. M. Cocke, Jr.,	Asheville.
"	Melvin E. Carter,	"
"	E. R. Hampton,	"
Burke,	A. C. Avery,	Morganton.
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.
"	John L. Chamberlain,	"
"	G. G. Luke,	Camden C. H.
Catawba,	John F. Murrill,	Hickory Tavern.
"	John B. Hussey,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
"	Henry A. London, Jr.,	"
"	James H. Headen,	"
Cherokee,	John Rolan,	Murphey.
"	P. C. Hughes,	Cherokee.
Columbus,	J. W. Ellis,	Whiteville.
Craven,	Henry R. Bryan,	New Berne.
"	H. C. Whitehurst,	"
"	L. J. Moore,	"
Currituck,	P. H. Morgan,	Indian Ridge.
Davidson,	F. C. Robbins,	Lexington.
"	John H. Welborn,	"
Duplin,	Wm. A. Allen & Son,	Kenansville.
Edgecomb,	W. H. Johnston,	Tarboro.
"	John S. Bridgers & Son,	"
"	H. L. Stratton, Jr.,	"
Forsythe,	D. P. Mast,	Winston.
Franklin,	Wm. K. Barham,	Louisburg.
Gates,	Geo. E. Gatling,	Sunburg.
Granville,	John W. Hays,	Oxford.
Greene,	W. J. Rasberry,	Snow Hill.
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Halifax C. H.
"	E. Tyler Branch,	Enfield.
"	Wm. H. Day,	Halifax
"	Daniel Bond,	Enfield.
"	W. H. Kitchin,	Scollard Neck.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Henderson,	John D. Hyman,	Hendersonville.
Hertford,	Thos. R. Jernigan,	Harrellsville.
Hyde,	Louis H. Barrow,	Middleton.
Jackson,	James R. Love,	Webster.
Macon,	K. Elias,	Franklin.
Martin,	Abner S. Williams,	Williamston.
"	Jos. T. Waldo,	Hamilton.
McDowell,	W. H. Malone,	Marion.
Mecklenberg,	W. P. Bynum,	Charlotte.
"	R. D. Osborne,	"

NORTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
New Hanover,	Alex. T. Loudon,	Wilmington.
"	W. R. Empie,	"
Northampton,	David A. Barnes,	Jackson.
"	W. W. Peebles,	"
"	Robert I. Beale,	Potocasi.
"	Thomas J. Person,	Garysburg.
Onslow,	Richard W. Nixon,	Jacksonville.
Orange,	Graham & Graham,	Hillsboro.
"	Samuel H. Webb,	Oaks.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth C.
"	James P. Whedbee,	"
"	Wm. F. Martin,	"
Perquimans,	J. M. Albertson,	Hertford.
"	T. G. Skinner,	"
Person,	Samuel C. Barnett,	Roxboro.
"	J. J. Lansdell,	"
Pitt,	T. C. Singletary,	Greenville.
"	Johnston & Nelson,	"
"	S. S. Wallace,	"
Richmond,	Gilbert M. Patterson,	Laurensburg.
Rockingham,	Reid & Settle,	Wentworth.
"	S. Ferd. Watkins,	"
Rowan,	Blackmer & McCorkle,	Salisbury.
"	James E. Kerr,	"
Sampson,	Milton C. Richardson,	Clinton.
Stokes,	A. H. Joyce,	Danbury.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.
"	Wm. H. Battle & Son,	"
"	Lewin W. Barringer,	"
"	Quentin Busbee,	"
"	R. W. York,	Morrison.
Watauga,	Hervey Bingham,	Boone.
Wilkes,	L. L. Witherspoon,	Wilkesboro.
Yadkin,	John A. Hampton,	Hamptonville.
"	Alford N. Smith,	Yadkinville.

OHIO.

Adams,	F. D. Bayless,	West Union.
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapakoneta.
Belmont,	M. D. King,	Barnesville.
Brown,	Baird & Young,	Ripley.
Crawford,	Thomas Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington.
Franklin,	John G. McGuffey,	Columbus.

OHIO—Continued.

COUNTY.	NAME	POST OFFICE.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randell,	Cincinnati.
"	Moulton & Johnson,	"
"	Henry Stanberry,	"
"	A. Taft & Sons,	"
"	Rufus King,	"
"	Stanley Mathews,	"
"	Thomas T. Heath,	"
"	Benj. Butterworth,	"
"	Hoadley & Johnson,	"
"	Archer & McNeill,	"
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Mahoning,	Landon Masten,	Canfield.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Lewis,	Medina.
Meigs,	J. P. Bradbury,	Pomeroy.
Miami,	Walter S. Thomas,	Troy.
Montgomery,	J. A. McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnelsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville.
Pike,	J. J. Green,	Waverly.
Sandusky,	John Elwell,	Fremont.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Schaefer,	Canton.
Tuscarawas,	A. L. Neely,	New Philadelphia.
Washington.	Knowles, Alban & Hamilton,	Marietta.

OREGON.

Baker,	L. O. Sterns,	Baker City.
Douglas,	W. R. Willis,	Roseburg.

PENNSYLVANIA.

Alleghany	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
Dauphin,	I. M. McClure,	Harrisburg
Elk,	George A. Rathburn,	Ridgeway.

PENNSYLVANIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	McDowell & Litman,	Uniontown.
Indiana,	J. N. Banks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Montour,	Isaac X. Grier,	Danville.
Northampton,	M. Hale Jones,	Easton.
Perry,	Lewis Potter.	New Bloom.
Philadelphia,	Wm. Henry Rawle,	Philadelphia.
Pike,	John Nyce,	Milford.
Schuylkill,	J. W. Ryan,	Pottsville.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

SOUTH CAROLINA.

Abbeville,	Perrin & Cothran,	Abbeville,
Aikin,	Wm. S. Tillinghast,	Aiken,
"	J. W. Croft,	"
"	J. C. Davant,	Allendale,
Anderson,	J. S. Murray,	Anderson.
"	B. F. Whitner,	Anderson.
Barnwell,	Samuel J. Hay,	Barnwell.
"	John J. Maher,	"
"	Finley & Henderson,	Aiken.
"	H. M. Thompson,	Williston,
"	James Thomson,	Blackville.
"	Izlar, Dibble & Dibble,	Bamberg,
Beaufort,	C. J. C. Hutson,	Yemassee.
"	W. J. Verdier,	Beaufort.
Charleston,	Memminger, Pinckney & Jervey,	Charleston.
"	M. L. Wilkins,	"
"	Brewster, Sprat & Burke,	"
"	Corbin & Stone.	"
"	Wilmot G. DeSaussure,	"
"	Simons & Siegling,	"
"	Magrath & Lowndes,	"
"	Simonton & Barker,	"
"	Asher D. Cohen,	"
"	Walker & Bacot,	"
"	Simons & Simons,	"
"	Whaley & Mitchell,	"
"	C. Richardson Miles,	"
"	I. N. Nathana,	"
"	Wm. Tennent,	"
"	Thomas M. Hanckel,	"
"	Rutledge & Young,	"
Chesterfield,	W. L. T. Prince,	Cheeraw.

SOUTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
Cheraw.	McIvor & Malloy,	Cheraw.
Darlington.	Haynsworth, Fraser & Barron,	Manning.
"	Joseph F. Rhame,	"
Edgefield.	Williams & Fox,	Waterboro'.
"	McIver & Boyd,	Darlington C. H.
"	Ward & Hill,	"
"	Thomas P. Magrath,	Edgefield C. H.
"	J. C. Sheppard,	"
Greenville.	James H. Rion,	Winnsboro'.
"	Earle & Blythe,	Greenville.
"	Isaac M. Bryan,	"
"	Arthur & Arthur,	"
Lancaster.	Tom F. Gillespie,	Conwayboro.
Laurens.	Kershaw & Kershaw.	Camden.
Marion.	W. A. Moore,	Lancaster.
Richland.	S. & H. L. McGowan,	Laurens C. H.
Sumter.	Hudson & Newton,	Bennettsville.
Union.	Jones & Jones,	Newberry.
York.	Johnstone & Harrington,	"
Orangeburg.	W. J. DeTreville,	Orangeburg.
"	Malcolm Browning,	"
"	Izlar & Dibble,	"
"	H. Powell Cooke,	St. Matthews,
Walhalla.	J. H. Whitner,	Walhalla.
"	Whitner Symmes,	"
Pickens.	Spartan D. Goodlet,	Pickens C. H.
"	Holcombe & Child,	"
Columbia.	Melton & Clark,	Columbia.
"	Arthur & Boone,	"
"	Pope & Haskell,	"
"	Ta'ley & Barnwell,	"
"	Melton & Chamberlain,	"
Spartansburg.	J. M. Elford,	Spartansburg.
"	Duncan & Cleveland,	"
Sumpter.	Richardson & Son,	Sumpter.
Union.	Robert W. Shand,	Union.
"	William Munro,	"
Kingstree.	Thomas M. Gilland,	Kingstree.
"	S. W. Maurice,	"
Yorkville.	Clawson & Thomson,	Yorkville.

TENNESSEE.

Shelbyville.	H. L. & R. B. Davidson,	Shelbyville.
"	Edmund Cooper,	"
"	Coldwell & Waters,	"
Camden.	W. F. Doherty,	Camden.
Pikeville.	S. B. Northrup,	Pikeville.
Marysville.	Sam. P. Rowan,	Marysville.
"	McGinley & Hood,	"

COUNTY.	NAME.	POST OFFICE.
Blount,	C. T. Cates,	Maryville
Bradley,	J. N. Aiken,	Charles
"	P. B. Mayfield,	Cleveland
"	J. H. Gaut,	"
"	R. M. Edwards,	"
Cannon,	Burton & Wood,	Woodbury
"	F. S. Singletary,	Elizabeth
"	Butler & Emmert,	"
"	H. M. Folsom,	"
Carroll,	James P. Wilson,	Huntington
"	Hawkins & Towns,	"
"	E. F. Estes,	"
Coffee,	W. P. Hickerson,	Manchester
"	Iraby C. Stone,	"
Cheatham,	L. J. Lowe,	Ashland
"	S. D. Power,	"
Coke,	McSween & Son,	Newport
Davidson,	Neill S. Brown, Jr.,	Nashville
"	J. R. Hubbard,	"
"	Allen & Covington,	"
"	Ed. Baxter,	"
"	John M. Bass, Jr.,	"
"	Wm. B. Bate,	"
"	Neill S. Brown,	"
"	C. D. Berry,	"
"	J. B. Brown,	"
"	A. L. Demoss,	"
"	Guild & Dodd,	"
"	J. C. & J. M. Gaut,	"
"	Wm. A. Glenn,	"
"	Alex. A. Hall,	"
"	M. B. Howell,	"
"	T. A. Kercheval,	"
"	Philip Lindsley,	"
"	Overton Lea,	"
"	John Lellyett,	"
"	Thomas H. Malone,	"
"	F. C. Maury,	"
"	McClanahan & McAlister	"
"	A. G. Merritt,	"
"	J. L. Thompson,	"
"	John Ruhm,	"
"	Wm. B. Reese,	"
"	Baxter Smith,	"
"	Whitman & Cobb,	"
"	Stubblefield & Childress,	"
"	Thomas M. Steger,	"
"	James Trimble,	"
"	R. S. Tuthill,	"

TENNESSEE—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Davidson,	G. P. Thruston,	Nashville.
"	A. S. Colyar & Sons,	"
"	M. Vaughn,	"
"	Frank E. Williams,	"
"	Edward H. East,	"
"	R. McP. Smith,	"
"	Wm. F. Cooper,	"
"	Robert Ewing,	"
"	John & Frank T. Reid,	"
"	Alex. B. Hoge,	"
"	J. T. Brown,	"
"	Andrew Allison,	"
"	Ed. Mulloy,	"
"	Wirt Hughes,	"
Decatur,	James M. Porterfield,	Decaturville.
"	A. A. Steagald,	"
Kalb,	Nesmith & Bro.,	Smithville.
"	Wm. B. Stokes,	"
Meigs,	McNeiley & Morris,	Charlotte.
Mer,	A. P. Hall,	Dyersburg.
"	H. W. L. Turney,	"
"	S. R. Latta,	"
"	Charles C. Moss,	"
"	R. A. W. James,	"
Monroe,	John W. Harris,	Somerville.
"	H. C. Moorman,	"
"	Wm. A. Milliken,	"
"	Fred M. Taylor,	"
Montgomery,	A. M. Garrett,	Jamestown.
"	W. Adrian Murray,	"
Polk,	Newman & Turney,	Winchester.
"	Williams & Martin	"
"	Syler & Simmons,	"
"	Colyar & Curtis,	"
"	J. B. Fitzpatrick,	"
Putnam,	G. H. Hall,	Trenton.
"	A. Wise, & John S. Cooper.	"
"	Sp'l. Hill,	"
"	M. M. Neil,	"
Randolph,	James & W. H. McCallum,	Pulaski.
"	Jones & Ewing,	"
Sevier,	J. C. Hodges,	Morristown.
"	R. M. Barton,	"
Shelby,	James T. Shields	Bean's Station.
"	A. H. Pettibone,	Greeneville.
"	H. H. Ingersoll,	"
"	Felix A. Reeve,	"
Union,	James W. Bouldin,	Altamont

TENNESSEE—Continued.

COUNTY	NAME.	PO
Hamilton,	M. H. Clift	Chattanooga
"	Ben. S. Nicklen,	"
"	V. A. Gaskell,	"
"	Key & Richmond,	"
"	W. L. Aiken,	"
"	Brawner & Mayre,	"
"	Vandyke, Cook & Vandyke,	"
"	Nash Burt,	"
"	Lewis Shepherd,	"
"	Trewhitt & Sharp,	"
"	G. A. Wood,	"
"	Xen Wheeler,	"
"	Tomlinson Fort,	"
"	J. S. Wiltse,	"
Hardeman,	G. W. Hardin,	Bolivar.
"	Jesse Normont,	"
Hardin,	John A. Pitts,	Savannah
"	Jno. & Jno. D. McDougal,	"
Hawkins,	A. A. Kyle,	Rogersville
"	F. M. Fulkerson,	"
"	W. F. Kyle,	"
Haywood,	H. B. Folk,	Brownsville
"	Hall & Williamson,	"
"	E. J. & J. C. Read,	"
"	Benj. J. Lea,	"
"	Wm. F. Talley,	"
"	Willo Haywood,	"
Henderson,	Taylor & Woods,	Lexington
Henry,	J. N. Thomason,	Paris.
"	Dunlap & Taylor	"
Hickman,	O. A. Nixon,	Centreville
"	Murphree & Cunningham,	"
Humphreys,	H. M. McAdoo,	Waverly.
"	V. S. Allen,	"
"	H. M. Little,	"
Jackson,	R. A. Cox,	Gainesboro
"	Jno. P. Murray,	"
"	M. G. Butler,	"
"	George H. Morgan,	"
Jefferson,	O. C. King,	Mossy Creek
"	Joel A. Dewey,	Dandridge
Knox,	John Baxter,	Knoxville
"	Chas. H. Flournoy,	"
"	Thornburgh & McGuffey,	"
"	J. H. Crozier & Son,	"
"	George Washington,	"
"	Washburn & Houk,	"
"	Lewis & Comfort,	"
"	M. L. Hall,	"

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
Knox,	Cocke, Henderson & Tillman,	Knoxville.
"	D. D. Anderson,	"
"	L. A. Gratz,	"
"	C. E. Lucky,	"
"	T. A. R. Nelson,	"
"	W. J. Hicks,	"
"	T. S. Webb,	"
Macon,	W. H. Adams,	Tiptonville.
Macon,	C. H. Connor,	Ripley.
"	Marley & Steele,	"
"	Lynn & Oldham,	"
"	W. D. Wilkinson,	"
Lawrence,	R. H. Rose,	Lawrenceville.
Lincoln,	Bright & Sons,	Fayetteville.
"	J. H. Holman,	"
"	W. F. Kercheval,	"
"	Jo. G. Carrigan,	"
Madison,	M. N. Alexander,	Lafayette
"	Jno. L. H. Tomlin,	Jackson.
"	Jno. H. Freeman,	"
Marion,	Amos L. Griffith,	Jasper,
"	A. A. Hyde,	"
Marshall,	James H. & Thomas F. Lewis,	Lewisburg.
Mary,	Thomas & Barnett,	Columbia.
"	Looney & Hickey,	"
"	Vance Thompson,	"
"	Wright & Webster	"
"	J. T. L. Cochran,	"
Meigs,	V. C. Allen,	Decatur.
"	T. M. Burkett,	"
Montgomery,	W. A. Quarles,	Clarksville.
"	John P. Campbell,	"
"	John F. House,	"
"	H. C. Merritt,	"
"	H. H. Lurton,	"
"	Jas. E. Bailey,	"
Monroe,	Staley & McCrosky,	Madisonville.
"	H. A. Chambers	"
"	R. Pritchard,	"
"	W. L. Harbison,	Sweetwater
Minn,	Briant & Richmond,	Athens.
"	T. N. Van Dyke,	"
"	Wm. M. Bradford,	"
Nash,	James F. McKinney,	Purdy.
Nash,	J. G. Smith,	Troy.
Newton,	A. F. Capps,	Livingston.
"	James B. Cox,	Nettle Carrier.
Putnam,	James L. Sloan,	Linden.
"	J. P. Ledbetter,	"

TENNESSEE—Continued.

COUNTY.	NAME.	Pos
Polk,	John C. Williamson,	Benton.
Putnam,	H. Denton,	Cookevi
Roane,	Samuel L. Childress,	Kingston
Robertson,	Wm. M. Hart,	Springfi
"	John E. & A. E. Garner,	"
"	Stark & Judd,	"
"	George R. Scott,	"
Rutherford,	Ridley & Ridley,	Murfrees
"	E. D. Hancock,	"
"	John W. Burton,	"
"	Palmer & Richardson,	"
"	Avent & Childress,	"
Sevier,	G. W. Pickle,	Seviervi
Shelby,	W. A. Dunlap,	Memphi
"	H. Townsend,	"
"	Wat. Strong,	"
"	Wm. H. Stephens,	"
"	E. B. Barnes,	"
"	Adams & Dixon,	"
"	Wm. J. Duval,	"
"	J. W. Scales,	"
"	Patterson & Lowe,	"
"	T. S. Ayres,	"
"	W. G. Rainey,	"
"	E. A. Cole,	"
"	Wright & Folks,	"
"	A. J. Martin,	"
"	Luke W. Finlay,	"
"	H. Clay King,	"
"	B. C. Brown,	"
"	R. P. Duncan,	"
"	H. G. Smith,	"
"	Wm. M. Smith,	"
"	Henry Craft,	"
"	C. W. Metcalf,	"
"	Humes & Poston,	"
"	W. L. Scott,	"
"	J. A. Anderson,	"
"	T. W. Brown,	"
"	Myers & Wyatt,	"
"	L. B. McFarland,	"
"	R. E. Hutchinson,	"
"	Wilson & Beard, 33 Madison St.,	"
"	Wm. M. Randolph,	"
"	E. S. Hammond,	"
"	Ellett & Phelan,	"
"	U. W. Miller,	"
"	J. E. Temple,	"
"	Edward L. Belcher,	"

TENNESSEE.—Continued.

COUNTY.	NAME.	POST OFFICE.
Belby,	Jno. Somervell, 308 3rd St.	Memphis.
"	H. B. Martin,	"
"	Minor Merrewether,	"
"	Hanson, Estes & Dashill,	"
"	M. D. L. Stewart,	"
"	B. P. Anderson,	"
"	George W. Winchester,	"
"	Haynes & Stockton,	"
"	Charles Kortrecht,	"
"	Thos. C. Lowe,	"
"	W. P. Martin,	"
"	Harris & Harris,	"
"	Harris, Pillow & Pillow,	"
"	Estis & Jackson,	"
"	James O'Pierce,	"
"	C. W. Frazier,	"
"	W. L. Duff,	"
"	Wm. B. Streer,	"
"	L. D. McKisick,	"
"	L. Lehman,	"
"	T. B. Edgington,	"
"	Walker & Horrigan,	"
"	Gantt & McDowell,	"
"	J. M. Crews,	Wythe Depot.
Smith,	E. W. Turner,	Carthage.
"	W. H. DeWitt,	"
"	Jos. W. Windle,	"
Sullivan.	W. D. Haynes,	Blountville.
"	D. F. Bailey,	Bristol.
Sumner,	Jas. W. Blackmore,	Gallatin.
"	Wilson & Vertrees,	"
"	J. A. Trousdale,	"
Stewart,	J. M. Scarborough,	Dover.
Tipton,	Thomas B. Carraway,	Covington.
"	Peyton I. Smith,	"
Trousdale,	McMurray & Bennett,	Hartsville.
"	W. J. Neely,	"
Warren,	J. P. Thompson,	McMinnville.
"	Thos. Murray,	"
Washington,	Felix W. Earnest,	Jonesborough.
"	S. W. Kirkpatrick,	"
"	Akard & Young,	Johnson City.
"	Robert Love,	Johnson City.
Wayne,	R. P. & Z. M. Gypert,	Waynesboro'.
Weakley,	W. P. Caldwell,	Gardner.
"	Charles M. Ewing,	Dresden.
"	S. B. Ayres,	"
"	John Somers,	"
Williamson,	Hicks & Magness,	Franklin.

TENNESSEE—Continued.

COUNTY	NAME.	PO
Williamson,	Miller & Fowlkes,	Franklin
"	T. W. Turley,	"
"	Dav Campbell,	"
Wilson,	Tarver & Gollady,	Lebanon
"	Andrew B. Martin	"
"	Jordan & Jas. F. Stokes,	"
"	R. L. Caruthers,	"
"	J. W. Phillips,	"
"	R. Cantrell	"

TEXAS.

Anderson,	J. N. Garner,	Palestine
"	Bush & McLure,	"
Angelina,	H. G. Lane,	Homer.
Aransas,	Wm. W. Dunlap,	Rockport
"	J. Williamson Moses,	"
Atascosa,	W. H. Smith,	Pleasanton
Austin,	Ben. T. & Charles A. Harris,	Bellville
"	Jas. H. Shelburn,	Industry
Bastrop,	Fowler & Wilkes,	Bastrop.
Bell,	McGinnis & Lowry,	Belton.
"	A. J. Harris,	"
"	Saunders & Holman,	"
Bexar,	Thomas M. Paschal,	San Antonio
"	S. G. Newton,	"
Bosque,	Henry Fossett,	Meridia
"	J. K. Helton,	Clifton.
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbi
"	Abner S. Lathrop,	Brazoria
"	Munson & Shapard,	Columbi
Brazos,	John Henderson,	Bryan.
"	Page & Simms,	"
"	G. I. Goodwin,	"
Brown,	H. B. Tarver,	Brownw
"	Gallatin Brown,	"
"	Mays & Newton,	"
"	Stephens & Lessing,	"
Burk,	James H. Jones,	Henders
Burleson,	A. W. McIver,	Caldwel
Burnet,	W. A. Blackburn,	Burnett.
Caldwell,	Nix & Storey,	Lockhar
"	M. R. Stringfellow,	"
Galhoun,	John S. Givens,	Indianol
"	W. H. Woodward,	"
"	Wm. H. Crain,	"
Cameron,	Powers & Maxan,	Brownsv
Cherokee,	Sam A. Willson,	Bush.

TEXAS—Continued.

COUNTY.	NAME.	POST OFFICE.
Collin,	R. J. Browning,	McKinney.
"	R. C. White,	"
Colorado,	Harcourt & Harcourt,	Columbus.
"	Delancy & Fleming,	"
"	James W. Smith & Rowan Green,	"
Comac,	James M. Taylor,	New Braunfels.
Comanche,	John D. Stephens,	Comanche.
"	Jo. G. Hardin,	"
Cook,	C. C. Potter,	Gainesville.
"	Weaver & Bordeaux,	"
Coryelle,	J. C. Jenkins,	Gatesville.
"	W. O. Campbell,	"
Dallas,	John M. Crockett,	Dallas.
"	W. M. Edwards,	"
"	R. D. Coughanout,	"
"	Barksdale & Eblen,	"
"	W. H. Price,	"
"	Robert B. Seay,	"
"	Wm. C. Wolff,	"
Denton,	Jackson & Downing,	Denton.
"	Carroll & Mullen,	"
"	Wm. P. Mayes,	"
Ellis,	W. H. Griffin,	Ennis.
"	E. P. Anderson & Bro.,	Waxahachie.
"	H. H. Sneed,	"
El Paso,	P. J. Walker,	El Paso.
Erath	John W. Cartwright,	Stephensville.
Falls,	Wm. R. Reagan,	Marlin.
"	M. C. Smith,	"
"	Thomas D. Williams,	"
"	T. P. & B. L. Aycock,	"
Fannin,	Roberts & Semple,	Bonham.
"	W. A. Evans,	"
Fayette,	John C. Stiche,	La Grange.
"	Isaac Sellers,	"
"	Moore & Ledbetter,	"
Fort Bend,	R. J. Calder,	Richmond.
"	Pearson & Croom,	"
Freestone,	O. C. Kirven,	Fairfield.
"	Theo. G. Jones,	"
Galveston,	Chas. Olfton,	Galveston.
"	Willie & Cleveland,	"
"	Joseph & Kittrell,	"
"	Hays & Hays,	"
"	Mann & Baker,	"
"	T. N. Waul,	"
"	Harris & Masterson,	"
"	Edward Collier,	"
"	G. W. Le Vin,	"

TEXAS.—Continued.

COUNTY.	NAME.	POST OFFICE.
Gonzales,	Harwood & Conway,	Gonzales.
"	Everett Lewis,	"
"	A. S. Chevalier,	"
Grayson,	Woods & Cowles,	Sherman.
"	John D. Pope,	"
"	Thos. C. & Jas. K. Bass,	"
Grimes,	McDonald & Meachem,	Anderson.
Guadalupe,	Washington E. Goodrich,	Seguin.
"	John Ireland,	"
"	Alexander Henderson,	"
Harris,	Crosby & Hill,	Houston.
"	James Masterson,	"
"	Henry Bradshear,	"
"	R. G. Rawley,	"
"	Henderson & Cook,	"
"	J. B. Linkens,	"
"	W. P. & E. P. Hamblen,	"
"	W. S. Oldham,	"
"	C. Anson Jones,	"
"	Stewart & Barziza,	"
Harrison,	J. B. Williamson,	Marshall.
"	W. H. Pope,	"
"	Hall & Lipscomb,	"
"	Wm. Stedman,	"
Hays,	Yoe & Brown,	San Marco.
"	W. O. Hutchison,	"
Henderson,	Thos. D. Evans,	Athens.
Hidalgo,	L. H. Box,	Edinburgh.
Hill,	Wm. B. Tarver,	Hillsboro'.
Houston,	D. A. Nunn,	Crockett.
"	Mark Miller,	"
"	S. A. Miller,	"
Hunt,	Sam. Davis,	Greenville.
"	Edward J. Darden,	"
"	S. S. Weaver,	"
"	W. C. Jones,	"
"	James A. Poage,	"
Jack,	Thomas Ball,	Jacksboro'.
"	A. R. Bennett,	"
Jasper,	Moulton & Doom,	Jasper.
Jefferson,	J. K. Robertson,	Beaumont.
"	Tom J. Russell,	"
Johnson,	Hazlewood & English,	Cleburne.
"	Benjamin F. Bledsoe,	"
"	B. D. Simpson,	"
"	M. A. Oatis,	"
"	D. T. Bledsoe,	"
Karnes,	Lawhon & Bookhout,	Helena.
Kaufman,	Manion & Adams,	Kaufman.

T E X A S.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Kaufman,	H. W. Kyser,	Kaufman.
"	R. F. Slaughter,	"
"	W. A. Hindman,	"
Kerr,	R. F. Crawford,	Kerrsville.
Lamar,	S. B. Maxey,	Paris,
"	James B. Davis,	"
Lampasas,	White & Gibson,	Lampasas.
Lavaca,	H. R. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
"	Johnston, Barnes & Weir,	Jewett.
Limestone,	Prendergrast & Davis,	Springfield.
"	J. T. Ratcliff,	Tehuacana.
Marion,	Crawford & Crawford,	Jefferson.
"	Penn & Todd,	"
"	W. G. Irwin,	"
"	John Penman,	"
"	M. F. Moore,	"
McLennan,	Flint, Chamberlin & Graham,	Waco.
"	F. H. Sleeper,	"
"	West & Prather,	"
"	R. W. Davis,	"
"	Wm. McKendale,	"
"	David H. Hewlett,	"
"	Thos. Harrison,	"
"	Andrew J. Evans,	"
Menard,	Chris. C. Callan,	Menardville.
Milam,	C. R. Smith,	Cameron.
"	Tarver & Martin,	"
"	F. M. Adams,	"
Montague,	Jackson & Grigsby,	Montague.
"	John H. Stephens,	"
"	Hagler & Morris,	"
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Corsicana.
"	Upshaw, Frost & Barry,	"
"	N. C. Read,	"
Newton,	John T. Stark,	Newton.
Nueces,	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Panola,	Ben. M. Baker,	Carthage.
"	Augustus M. Carter,	"
Parker,	R. W. S. Shepherd,	Weatherford.
"	J. H. Harberger,	"
Polk,	J. M. Crosson,	Livingston.
Red River,	Geo. F. Conly,	Clarksville.
"	Jas. H. Clark,	"
"	R. R. Gaines,	"
Robertson,	F. A. Hill,	Calvert.

TEXAS.—Continued.

COUNTY.	NAME.	POST OFFICE.
Rusk,	R. M. Wynne,	Henderson.
"	C. B. Kilgore,	Kilgore.
Sabine,	J. M. Watson,	Hemphill.
"	Wm. W. Weatherred,	Milam.
San Augustine,	S. B. Bewley,	San Augustine.
San Jacinto,	Cleveland & Lea,	Cold Springs.
"	W. B. Denson,	"
San Saba,	Geo. B. Cooke,	San Saba.
Shelby,	D. S. & E. F. Caninhan,	Center.
Smith,	S. T. Newton,	Tyler.
"	Charles W. Stocker,	"
"	Stephen Reaves,	"
"	Robertsons & Heverdon,	"
"	Jones & Henry,	"
Starr,	B. B. Seat,	Rio Grande City.
Tarrant,	Hendricks & Smith,	Fort Worth.
"	B. B. Paddock,	"
"	John F. Swayne,	"
"	Bedford Brown,	"
"	W. M. Campbell,	"
Titus,	Henry Dillahunty,	Mount Pleasant,
Travis,	Ghandler & Carleton,	Austin.
"	Hancock & West,	"
"	W. R. Wallace,	"
"	A. M. Jackson,	"
"	M. A. Long,	"
"	Miller & Dowell,	"
"	G. Davis,	"
"	Chandler, Carleton & Robertson,	"
"	Jas. B. Morris,	"
"	J. W. Cunningham,	"
"	D. E. Thomas,	"
"	Archer & Moore,	"
Trinity,	S. S. Robb,	Sumpter.
"	J. P. Stevenson,	Trinity Station.
Usher,	J. L. Camp,	Gilmer.
"	James & McCord,	Longview.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Phillips, Lackey & Stayton,	Victoria.
Washington,	P. H. & J. T. Swearingen,	Benham.
"	W. H. Billingslea,	Chapel Hill.
"	O. T. Holt,	Burton.
"	J. W. Stone,	Chapel Hill.
Webb,	H. C. Peterson,	Laredo.
Williamson,	Coffee & Henderson,	Georgetown.
"	McTeaden & Fisher,	"
"	E. T. Allen,	Fris City.
Wise,	Booth & Ferguson,	Decatur.
Wood,	J. J. Jarvis,	Quitman.

U T A H.

COUNTY.	NAME.	POST OFFICE.
Great Salt Lake,	Fitch & Mann,	Salt Lake City.

V E R M O N T.

Caledonia,	Belden & May,	St. Johnsbury.
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V I R G I N I A.

Accomack,	Gunter & Gillet,	Accomack C. H.
"	T. H. B. Browne,	Accomac.
Albemarle,	Blakey & Rierson,	Charlottesville.
"	Thomas L. Michie,	"
"	Micajah Woods,	"
"	Wm. J. Robinson,	"
"	Thomas S. Martin,	Scottsville,
Alexandria,	Ball & Mushbach,	Alexandria.
"	John M. Johnson,	"
Amherst,	Rich'd. A. Taliaferro,	Amherst C. H.
"	H. M. Wharton,	"
Appomattox,	E. R. Woodson,	Pamplins.
Augusta,	Effinger & Craig,	Staunton.
"	S. Travers Phillips,	"
Botetourt,	F. H. Mays,	Fincastle.
"	W. A. Glasgow	"
"	Edmund Pendleton,	Buchanan.
Buckingham,	N. F. Bocock,	Buckingham.
"	Wm. M. Cabell,	"
"	W. Merry Perkins,	Buckingham C. H.
"	D. J. Woodfin,	New Canton.
Campbell,	Wm. & J. W. Daniel,	Lynchburg.
"	Don P. Halsey,	"
"	John. B. Robinson,	"
"	Edw'd. D. Christian,	"
"	John C. Murrell,	Campbell C. H.
Carroll,	Norman Hale,	Hillsville.
Caroline,	Washington & Chandler,	Bowling Green.
Charlotte,	Thos. E. Watkins,	Charlotte C. H.
"	John M. Bouldin,	"
Clark,	A. Moore, Jr.	Berryville.
Craig,	James W. Marshall,	New Castle.
Culpepper,	A. R. Alcocke,	Culpepper.
"	Edward Cunningham,	Brandy Station.
Cumberland,	Sam'l F. Coleman,	Oak Forrest.
"	W. M. Cooke,	Cumberland C. H.
Dinwiddie,	Watkins & Cocke,	Petersburg.
"	Sam'l. D. Davies,	"
"	Drury A. Hinton,	"
"	E. M. Cox,	"
"	Friend & Davis,	"
"	H. J. Heartwell,	Goodwynsville.
Elizabeth City,	G. M. Peek,	Hampton.
Fairfax,	H. W. Thomas,	Fairfax C. H.

VIRGINIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Farquier,	Hugh R. Garden,	Warrenton.
Fluvanna,	Wm. B. Pettit,	Palmyra.
"	Thomas H. Tutwiller,	"
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
"	L. T. Moore,	"
Gloucester,	J. T. & J. H. Seawell,	Gloucester.
"	Perrin Kemp,	"
Grayson,	Cornett & Cecil,	Independence.
Greene,	R. S. Thomas,	Standardsville.
Greenville,	W. S. Goodwyn,	Hicksford.
Halifax,	Armistead Barksdale,	Meads ville.
Hanover,	W. R. Winn,	Ashland.
Henrico,	George L. Christian,	Richmond.
"	John Hunter, Jr.	"
"	Alfred Morton,	"
"	John H. Gilmer,	"
"	Wm. J. Clopton,	"
"	James N. Dunlop,	"
House,	H. & P. H. Dillard,	Franklin.
Iale of Wight,	R. F. Graves, Jr.,	Smithfield.
King William,	B. B. Douglas,	Ayletta.
"	Wm. E. Hart,	West Point.
"	T. O. Dabney,	Lanesville.
King and Queen,	L. A. Tyler,	King & Queen C. H.
Lancaster,	B. H. Robinson,	Lancaster.
Lee,	David Miller,	Jonesville.
"	M. B. D. Lane,	"
Loudon,	John M. Orr,	Leesburg.
Lunenburg,	Webb & Bernard,	Lunenburg, C. H.
Madison,	Blakey & Terry,	Madison C. H.
"	Thos. J. Humphreys,	"
Matthews,	T. J. Christian,	Matthews C. H.
Mecklenburg,	Chambers, Gnode & Baskerville,	Boydton.
"	Ro. T. Thorp,	"
Montgomery,	John J. Wade,	Christiansburg.
"	Lewis A. Buckingham,	Childress' Store.
Nansemond,	John R. Kilby,	Suffolk.
Nelson,	Thomas P. Fitzpatrick,	Arrington.
"	Thompson & Brown,	"
New Kent,	John P. Pierce,	New Kent C. H.
"	Richmond T. Lacy, Jr.,	Barhamsville.
Norfolk,	Hinton, Goode & Chaplain,	Norfolk.
"	L. D. Starke,	"
"	Godwin & Crocker,	Portsmouth.
Nottoway,	Wm. R. Bland,	Wellville.
Page,	Richard S. Parks,	Luray.
Pittsylvania,	Edwin E. Bouldin,	Danville.
Prince Edward,	Berkeley & Berkeley,	Farmville.
Pulaski,	Lewis A. Buckingham,	Snowville.

VIRGINIA.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Roanoke,	Strouse & Marshall,	Salem.
"	Wm. W. Ballard,	"
"	James W. Palmer,	"
Rockbridge,	D. E. & J. H. Moore,	Lexington.
"	John W. Brockenborough,	"
Rockingham,	George G. Grattan,	Harrisonburg.
"	John Paul,	"
Russell	Jas. W. McBroom,	Lebanon.
Scott,	E. F. Tiller,	Estillville.
"	Henry W. Holdway,	Estillville.
Shenandoah,	E. Eugenius Stickley.	Strasburg.
Smyth,	Gilmore & Derrick,	Marion.
Southampton,	J. H. & J. B. Prince,	Jerusalem.
Spottsylvania,	Marye & Fitzhugh,	Fredericksburg.
Surrey,	George T. Clarke,	Bacon's Castle.
Sussex,	R. T. Wilson,	Wakefield.
Tazewell,	S. C. Graham,	Tazewell C. H.
"	H. C. Alderson,	"
Washington,	Frank A. Humes,	Abingdon.
Westmoreland.	Wm. M. Walker,	Montross.
Wise,	R. R. Henry,	Wise C. H.
Wythe,	Terry & Pierce,	Wytheville.
"	G. J. Holbrook,	"
York,	M. Tredway Hughes,	Yorktown.

WASHINGTON TERRITORY.

Jefferson,	B. F. Dennison,	Port Townsend.
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WEST VIRGINIA.

Berkeley,	Blackburn & Lamon,	Martinsburg.
Cabell,	B. F. Curry,	Hamlin.
"	A. Mitchell Warner,	Huntington.
Fayette,	Theophilus Gaines,	Fayette C. H.
Greenbrier,	Mathews & Mathews,	Lewisburg.
Hardy,	Jos. Sprigg,	Moorefield.
Harrison,	Gideon D. Camden,	Clarksburg.
Jackson,	Henry C. Fleisher,	Jackson C. H.
Jefferson,	Jo. Mayse,	Charlestown.
Kanawha	McWhorter & Freer,	Charleston.
Mason,	W. H. Tomlinson,	Point Pleasant.
Mineral,	George A. Tucker,	Piedmont.
Monongalia,	Willey & Son,	Morgantown.
Morgan,	J. Rufus Smith,	Berkeley Springs.
Ohio,	W. V. Hoge,	Wheeling.
Pocahontas,	D. A. Stofer,	Huntersville.
Preston,	G. Cresap,	Kingwood.
Raleigh,	Martin H. Holt,	Raleigh C. H.
Randolph,	David Goff,	Beverly.
Roane,	J. G. Schilling,	Spencer.
Upsher,	W. G. L. Totten,	Buckhannon.

WISCONSIN.

COUNTY.	NAME.	POST OFFICE.
Adams,	O. B. Lapham,	Friendship.
Brown,	Hastings & Greene,	Green Bay.
Clark,	Robert J. McBride,	Neillsville.
Dane,	Vilas & Bryant,	Madison.
Door,	D. A. Reed,	Sturgeon Bay.
Eau Claire,	Wm. Pitt Bartlett,	Eau Claire.
Grant,	Bushnell & Clark,	Lancaster.
Green,	Dunwiddie & Bartlett,	Monroe.
Green Lake,	John C. Truesdell,	Princeton.
Iowa,	George L. Frost,	Dodgeville.
Juneau,	R. A. Wilkinson,	Mauston.
LaFayette,	George A. Marshall,	Darlington.
Marquette,	Wm. H. Peters,	Montello.
Portage,	James O. Raymond,	Plover.
Richland,	Eastland & Eastland,	Richland Centre.
St. Croix,	J. S. Moffatt,	Hudson.
Washington,	Frisby & Weil,	West Bend.

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overhaul the Reverend gentleman's proceedings, and, after ridiculing his project and showing the utter inadequacy of the means for the proposed ends, (all of which it was conceded was legitimate criticism,) it went on to insinuate that the boasted list of subscribers for so absurd a scheme had, probably, no existence; that an "Old Soldier" and his subscription were alike fictitious, and that the whole affair was gotten up to gull a credulous public out of their money. The action was for the supposed libel in the last charge, the plaintiff alleging that his list was genuine, and that his object was honestly to do what he undertook. There was no plea of justification, the defendant simply pleading not guilty. At the trial the plaintiff testified to the correctness of his list, the subscriptions having been really made as alleged, and to the honesty of his intentions. A witness was also introduced who claimed to be the "Old Soldier," and who stated that he had made the subscription for the purpose proposed by the Reverend plaintiff, having faith in the efficiency of the scheme. A number of other respectable witnesses was also brought forward to prove the genuineness of their names and subscriptions. The proof, in fact, conclusively showed that the *Saturday Review* was woefully mistaken in supposing that the English people were not so credulous and gullible as the Reverend gentleman's publications had disclosed. The jury, under the direction of the Court, returned a special verdict. They directly negatived all malice on the part of the defendant, and found that he had written the review in good faith, believing what he stated, and for the purpose of calling the public attention to what he supposed was an imposition. The jury found for the plaintiff, unless the court should be of opinion that the special facts entitled the defendant to judgment, *non obstante reerdicto*. The learned Baron, before whom the case was tried, was of opinion, and this opinion was sustained by the court in *banc*, that the belief of a writer in the truth of his statements, and his good intentions in publishing them, can not protect him, if he avers what is not true, and imputes pecuniary motives as the sole inducement to the defendant's acts, which the jury find not to be attributable to such motives alone; that however silly the Reverend gentleman's scheme for christianizing the Chinese might be, or however inadequate the means proposed for so great an object, if the jury believed him to be sincere and his statements true, they were right in finding for him; that the public press had no privilege to charge improper motives, even when actuated by a laudable desire to enlighten and protect the public.

The English press have not acquiesced cheerfully in this ruling of the courts, and its correctness may well be doubted when it results in sustaining the suits of such foolish fanatics as the Reverend Mr. Campbell, and of such professional charlatans as Zadkiel. After all, however, the error may not be so much in the law, as in its practical workings in such cases. One is tempted, on occasions like these, to concede that things are sometimes done better in France.

The superiority of France in the efficiency of her police is universally conceded. This superior efficiency is due to a fundamental maxim of the French administrative system,—that no officer can be sued in the courts of law for any act done in the performance of his official duties, except by the previously obtained permission of the Council of State. In other words, the sufferer must first apply for permission to seek redress to the administration under which the officer holds his appointment, and by whose direction he may have acted. In times of quiet, when there is no struggle going on between the government and the people, the system works well. The police, then, act effectually for the prevention as well as the punishment of crime, and society is protected without any serious interference with the rights of the individual citizen. It is easy to see, however, that in a different state of public affairs, the police becomes a formidable weapon in the hands of the government over the liberty and lives of the subject. The laws of England throw no protection around its officials. They act, even in the discharge of duties which they are required to perform, at their peril. Honesty of intention will not protect them from responsibility for the legal exercise of their authority. In nothing is the genuine love of liberty of the Anglo-Saxon more recognizable than in this peculiarity of their law. But the peculiarity is not without attendant evils. The English police are very inefficient in the prevention of crime. After the horse is stolen, or the mischief done, the merits of the London detective are brought into play. Except when an illegal act is committed in his presence, or upon hue and cry, the policeman exposes himself to risk in arresting an individual. They can not interfere until an actual violation of the law is attempted. The shocking scenes in the most frequented streets of the great English cities, growing out of the social evil, are due to this fact. The exhibitions of Holywell street on the Strand, are attributable to the same cause. Here, in the most frequented cut-off of the great artery of London, the windows are filled with advertisements of notorious publications, and the unwary are attracted by artfully worded superscriptions upon

sealed up packages, importing that the contents are forbidden ware. In truth, however, these packages usually contain some innocent and unsaleable *brochure*, frequently of a religious character, which, if seized, would not in the least criminate the vendor. But the shop is, notoriously, a depot for the sale of forbidden fruit, when the proprietor is satisfied that he can trade without risk. The prints and accessories border upon the very edge of the law, without actually overstepping it. Upon expressing surprise to one of the largest publishers of the city, that such open displays should be permitted in the very center of business, he said that the police dared not interfere, unless an actual breach of the law was committed, nor even then, unless he himself, or some responsible third person, would undertake to prosecute. The right of the individual to seek redress by suit, no matter how honest might be the policeman's intentions, and the certainty that the plaintiff would recover some damages (although the amount might be nominal), no matter how notorious might be his violations of law in that very way in other instances, were too well understood to tempt the guardians of the public peace to run the slightest risk in a matter in which they had no more interest than any private citizen. The absence of any public prosecuting officer, and the necessity of conducting criminal prosecutions at one's own expense, are, also, very fruitful of evil. The license to offenders, thus conceded by the law in its anxiety to secure the entire independence of the honest citizen, emboldens them to run risks which would be fatal to them under the French system. As the French plan works best in times of quiet, so the English plan wonderfully protects the citizens in times of trouble. And, as quiet rarely ever continues any great length of time, and as agitation and commotion are the normal conditions of human progress, the preference must, after all, be conceded to the English. Better too much freedom than too little.

Of course, one of the chief sources of enjoyment to a lawyer abroad is attendance upon the various Courts of Westminster Hall, Lincoln's Inn, Guildhall, and the Old Bailey, with an occasional look into Doctor's Commons. The proceedings are very similar to those of our own Courts. Stripped of their wigs, and gowns, and high titles, the Honorable Judges are "very like" their American prototypes. The lawyers wrangle with the witnesses, and with each other; wrench and distort the testimony, and try to throw dust in the eyes of the jury, just as I had seen done all my life elsewhere. The examination of witnesses is, as a general rule, conducted more systematically than

with us, for the counsel is guided by a brief of the testimony prepared in advance; but, it may be doubted, whether it is on that account more searching and satisfactory. On the contrary, I was often struck with the fact that the counsel was content with putting a few important questions, leaving many things to inference, instead of bringing everything out clearly and fully. This habit may be due, in part, to the importance of saving time, but is, more probably, owing to the fact that the counsel has not been previously brought in contact with the witness, and does not, therefore, feel sufficient confidence to go outside of the points of his brief. The preparation of cases in advance tends, in other ways, to shorten the proceedings; and the trial of causes, even of great importance, occupy far less time than even trifling causes on this side of the Atlantic. A criminal trial, involving the life of the prisoner, rarely ever occupies more than a single sitting, although, in such cases, the court often continues in session until late at night. The arguments of counsel are briefer and more to the point, but not superior in forensic merit to those of the trans-Atlantic bar. The advocacy of the English barrister would be considered as very cold in many cases where his American compeer would exhibit great warmth. Not that passion and zeal are wanting in the English counsel, but they do not assume, in most instances, the demonstrative phase of the American. The eminent barristers certainly speak with great distinctness, clearness, and force, going over the ground, when permitted by the Court, methodically, never dwelling with "tiresome iteration" upon one point, and rarely ever repeating themselves. Many of the juniors, and even of the elder *oi polloi*, blunder along much after the fashion of the same class in other parts of the globe. You hear very few arguments based upon general principles, or upon broad and comprehensive views of law as a science. The argument is generally confined to a discussion of the precedents, and the grand object is to find a case in point. As a matter of fact, the training of the English bar is so peculiarly technical, and their learning so directed to the knowledge of cases, that what Legare said of them many years ago is still true, they are *par negotiis, neque supra*. Their legal logic, like their law, is local, not universal; able from their thorough mastery of the material, not from the general principles relied on. Even to this day, a large proportion of legal questions turns upon as technical reasoning as the famous gag with which Sir Thomas Moore is said to have closed the mouths of continental disputants: "*An carucae capiatur in Withernam sunt reperiabile.*"

Still, with all the love of an English lawyer for precedents, I did not see that they often extended their researches to the Year Books. I remember only a single occasion when a case from one of the Year Books was cited, which was in the Queen's Bench, but the court treated the reference with something very like contempt. Mr. Justice Blackburn suggested that the counsel instead of wasting his time in such obsolete researches, would have been better employed in studying the modern doctrine of interpretation—the matter in controversy turning upon the construction of a recent statute.

The opinions delivered by the courts in *banc* are almost always *viva voce* immediately after the argument of the case is closed. Their conclusions have usually been indicated in advance by their interpellation of counsel, and the opinions are delivered at once without even the form of consultation. Sometimes, however, they bring their heads together and consult, not over the reasons for the decision, but as to the result reached. The Lord Chief Justice delivers his opinion first, and is followed by his puisnes in the order of their seniority of appointment. These opinions are surprisingly terse and satisfactory, considering the haste with which they are delivered. Written opinions are the exception in English Courts, even to the House of Lords.

The English Judges in trials at *Nisi Prius*, always take full notes of the evidence, which are used in charging the jury, and are referred to when counsel disagree in their statements of fact. The charges to the jury are not, as I had previously supposed, brief and summary, but usually very full, and often, in fact, prolix. They are not at all chary of expressing their opinion on the testimony, always accompanying such expression with the qualification that the ascertainment of the facts is the province of the jury. As an example, I remember on one occasion the learned judge remarked to the jury that he would not say to them that there was no evidence to sustain a point of fact dwelt upon by one of the counsel, for that, he added, would be to infringe upon their province, which was to find the facts, and they might be able to discover what he could not, but he would say to them, that he had carefully heard all the testimony, had taken copious notes of it as he was bound to do, and had carefully looked over those notes, and he had been unable to discover a single scintilla of proof upon the point contended for.

The jury in civil cases rarely ever find contrary to the manifest inclination of the judge. Sometimes, but almost always in criminal cases, the jury take the bit in their mouths, and either have their own

way, or are very difficult to control. A recent and most amusing case of this kind has gone the rounds of the English press. It was the case of the *Queen vs. Flemstead*, tried at Hertford, on the 3d of March, 1864, before no less a person than the Lord Chief Baron Pollock, of the Court of Exchequer, a venerable, able, and high tempered dignitary. The prisoner was indicted for receiving from one Saunders a bushel of mixed corn (the word corn being used in its English sense), consisting of peas and oats, which had been stolen, knowing it to be stolen. The prosecutor, who was the employer of Saunders, missed some of his peas and oats, which were not then mixed, but kept separate. The corn found in the possession of the defendant was a mixture of peas and oats, and the prosecutor could not identify it as his property. The thief, Saunders, swore that the prisoner asked him to get the corn, and paid him a shilling for it, telling him to say nothing about it. On cross-examination, he stated that he had stolen the corn pure, not mixed, and had afterwards mixed them himself. The Prisoner's counsel being about to address the jury, the Lord Chief Baron remarked that he thought there was hardly sufficient evidence to convict. It was no doubt, he added, most important when the receiver of stolen property could be got at, to convict him, as without him the thief would have less inducement to steal; but it would be very dangerous to permit the thief himself to fix upon the person he might choose to charge as receiver. He presumed, therefore, that the jury would not require the prisoner's counsel to proceed. The jury, upon this, consulted together for a few moments, and then, to the surprise of everybody, returned a verdict of guilty. "Why, gentlemen," exclaimed the Lord Chief Baron, "you can not convict the prisoner without hearing his counsel." (A laugh.) "We thought," replied the foreman, "that we were to consider our verdict." "Not without hearing the prisoner's counsel," said his Lordship. "It appeared to me, I own," he added, "that you would not require to hear him; but you must hear him before you can render a verdict of guilty." The counsel then addressed the jury, relying upon the point suggested, that there was no evidence, except that of the thief, which ought not to be credited without other proof, or corroborating circumstances. The Lord Chief Baron then summed up as before, but more emphatically, saying in conclusion: "He deemed it his duty to tell the jury honestly, with all the sincere regard which he felt for their institution, that in his judgment the evidence was not such that they could, safely and satisfactorily, either to their own consciences or the interests of society, convict the ac-

cused." The jury consulted together, and again returned a verdict of guilty. But the angry Chief Baron would not receive it, and, after a short pause, he said to them: "Now then, gentlemen, it is my duty to direct you on a point of law to find a verdict of not guilty. The indictment charges the prisoner with receiving a mixture of corn and grain which had been stolen; but the evidence of the only witness, the thief, upon which you insist on pinning your faith, is that he stole pure corn, and mixed them, selling the mixture. The mixture had not been stolen, and so the indictment fails." The jury again consulted, and the foreman said: "My Lord, the jury think that it was a mixture when the prisoner received it, and that he knew it to be stolen." Lord Chief Baron (angrily), "Gentlemen, I tell you, in point of law he had not, and it is your duty to take the law from me. This is a matter of law, and while I would not trench upon your province, I can not permit you to trench upon mine." The jury once more consulted, and the foreman and one or two others still hesitated to return a verdict of acquittal, and desired to state the reasons; but the Lord Chief Baron refused to listen, and repeated his directions. At last, though with evident reluctance, the jury gave in, and returned a verdict of acquittal.

This case is the more remarkable that it is a rare occurrence to find a jury in a criminal prosecution more implacable than the court. The true secret of the jury's obstinacy in this instance was, no doubt, that they knew much more about the prisoner than the Lord Chief Baron, and had a thorough conviction of his guilt, growing out of that knowledge. The receiver of stolen property in a neighborhood is, always, a great nuisance, and it was important to get rid of a notorious offender, even if the proof was rather scanty in the particular case.

No one can attend an English Court, either at *Nisi Prius*, or in error, without being struck with the active supervision of the judge or judges in every thing that occurs, and the repeated interruptions of counsel while addressing the bench. I never, in a single instance, heard counsel quietly finish an argument, even upon a single point of law, without such interruption. In the large majority of cases, the interruptions are so numerous that the argument is literally broken up into fragments or entirely drawn off into new channels from those originally intended. This mode of conducting business must be very trying to the young barrister, but the old stagers, no doubt, get accustomed to it, like eels to being skinned, as the old woman suggests to the President of the society for the prevention of cruelty to animals,

in one of Cruikshank's comic almanacs. "Lord bless your soul," says she "they's used to it." The elder barristers do, by long usage, acquire the faculty of answering the impromptu questions put to them with readiness and spirit. But it must be rather agonizing at first. The English mind is naturally formal and methodical, and I often noticed the anxiety of the older counsel to keep the train of argument previously laid down, returning to it again and again in the pause following the sparrings with the bench, and only giving up in the end in sheer despair. This practice of the court most effectually, it must be admitted, does away with mere declamation on points of law, and waste of time in immaterial matters. On the other hand, it must often lead to hasty and not fully considered decisions. It sometimes happens that cases are thus disposed of upon points which have not occurred to the counsel on either side, and which they are not prepared to discuss, the point, having been sprung by some member of the court by a pertinent (or impertinent) question, he himself at first not being conscious of the full force of the suggestion.

The vast amount of business brought before the courts, seems to render the adoption of some such course by the judges indispensable. If every lawyer were permitted to "spread himself" on each case, and argue at length, as is often done with us, every possible point which he might suppose involved in the record, the dockets would present more formidable arrears of business than even under the administration of that greatest of purely English lawyers, and prosiest of doubters, Lord Eldon. The practice is *ex necessitate*, and more productive of good than evil. It looks undignified at first, and the bandying of objections does occasionally lead to some awkward scenes. The judge and the lawyers sometimes bring up with a flat contradiction upon a fact, or an equally flat difference of opinion on a point of law. Often, too, they get excited, and both speak at once, effectually drowning each other's voices. I remember, on one occasion in the court of Exchequer, a case of interpellation occurred between the bench and bar, which brought the lawyers on both sides to their feet, and the scene ended by a grand outburst, the four judges, then sitting, and each of the counsel all speaking at once, which was brought to a close by a general laugh on the part of the spectators and the rest of the bar.

The interpellations in the Court of Exchequer were usually more productive of fun than in the other courts, the Lord Chief Baron Pollock being an old man, of eccentric turn of mind, and very sarcastic, and his puisnes not quite so courteous as those of the Queen's

Bench. They were in the habit of saying sharp things to the counsel rather oftener than the judges of the other courts. All of the judges, however, indulge to a greater or less extent in this, perhaps, essential weapon to control a turbulent and energetic profession. They do not hesitate to reprehend the use of a particular line of argument, or the indulgence in broad assertion, or vituperative language. They exercise a salutary control over the manners and morals of their brothers, as they call the barristers, invariably addressing them as brother A. or brother B. The barristers, on their part, are not wanting in spirit, and often retort upon the court in a very telling manner. And they do not hesitate, when they think that the court has gone beyond the line of its duty, to assert the dignity of their position.

A recent case in Vice Chancellor Stuart's court will illustrate the fact. The learned Vice Chancellor, in a peculiar case, involving the character of persons of good family, had consented, upon the application of the counsel on one side, to hear the case privately, a discretion vested in the courts, but rarely ever exercised. The *Daily Telegraph*, one of the London dailies, denounced the act as a piece of flunkyism on the part of the court, because the parties were aristocratic, and contrived to procure an account of the proceedings, and published them. The learned Vice Chancellor, smarting under the insinuations of the *Telegraph*, took occasion to comment in open court upon the publication of the proceedings, which, he said, could not have happened without the aid of some of the counsel; and, rather unguardedly, he went on to charge the offense upon the counsel for the parties who had not applied for the private hearing, and characterized the act as unprofessional and ungentlemanly. Upon one of the barristers implicated undertaking to defend himself, the Vice Chancellor said he would not hear him. "But you shall hear me," was the prompt rejoinder, and the counsel went on to deny any connection with the publication. His associate also insisted upon being heard, saying that he would allow no judge to charge him with ungentlemanly or unprofessional conduct when he was not guilty. The Vice Chancellor was compelled to withdraw his charges.

The control which the judges exercise over the juries in civil actions, often leads to the appearance of partiality. The charge upon the facts is frequently a palpable effort to shape them to a desired end. This is strikingly evidenced, without any wrong intent, in cases where the mind of the learned judge, or his sympathies or prejudices, happen to be in conflict with those of the jury or the spectators. This was always the case, until within a recent period,

in libel suits, smuggling causes, and, of course, in State prosecutions for offenses against the government. Of late years, the number of these cases has greatly diminished; still, they do sometimes occur, and the charges of particular judges are often so unguarded as to subject them to the imputation of being influenced by improper motives. The conduct of one of the Old Bailey judges in this regard became so flagrant that it led to a scene, the bar openly asserting that the judge was not discharging his duties impartially. The English press, moreover, which is as plain spoken and sometimes as licentious in its language as its American off-shoot, do not hesitate to charge some of the learned judges with nepotism, that is, using the influence of their station in the disposition of causes so as to throw business into the hands of their relations or favorites. Favoritism of particular counsel by particular judges is, by no means, unknown. A strong and ably written article recently appeared in a monthly periodical of London, of large circulation and high standing, upon these points, and upon the haughty and domineering tone of some of the judges to that portion of the bar least favored by wealth and family influence, which is consolatory to those Americans who have been in the habit of supposing that the English judiciary system is perfect, and the English judges above reproach.

The independence of the judiciary is a favorite topic with modern statesmen, and certainly, if any judiciary can be considered as independent, the judiciary of England may. But the phrase itself is a vague one, and may be an evil rather than a benefit when carried so far as to bring the judiciary in conflict with the other departments of government. The judges are always dependent on their salaries, and will be inclined to sustain the authority through which it comes, whether crown or people, in all contests involving the interests or feelings of that authority, (the more so the larger the salary and the more permanent the tenure,) and be independent enough in other respects. Besides, judges are but men, and are, in all great crises, moved by the same passions and impulses that influence other men. The usurpations of the Government at Washington have been sustained by the judiciary of the Northern States from the same motives which influenced the Eldons and the Ellenboroughs to sustain the royal authority during the trying times following the French Revolution of 1789. The conscription act of the Congress of the Southern Confederacy has been pronounced valid by the Southern State Judges for the same reasons. It may well be that in certain exigencies the incumbents of the bench are called upon to act as statesmen

as well as judges, and yield the letter of the law for the peace of society. It is well known that M. DeTocqueville, for this very reason, eulogized the mode of selecting the judges of the Supreme Court of the United States from a class of lawyers eminent not only for legal acquirements, but for political experience. It is not for England, even in these her palmiest days of judicial independence, to throw the first stone at our American judges for their subserviency to the government, when equally glaring instances, without the same excuses, occur in their own courts in a time of profound quiet. The *Alexandra* case is a notable instance of judicial obedience to State necessity or governmental dictation, according as you are inclined to take a favorable or unfavorable view of the conduct of the learned judges.

That case grew out of the seizure by the English government of the steamer *Alexandra*, on the ground that she was being equipped and furnished for the Confederate government, contrary to the provisions of the act of Parliament known as the foreign enlistment act; the fact being that she was only being built for, or to be sold to the Confederate Government. That statute was intended to prohibit the enlistment of troops by a foreign belligerent within her Majesty's dominions, the getting up of warlike expeditions within her borders not authorized by the government, and the equipping and furnishing of ships for direct expeditions from the ports of England. It contains not one word forbidding the building of ships of war for a foreign belligerent, nor the selling such belligerent war material in the usual course of trade. In other words, the object of the act was not to interfere with the regular business of the builders and manufacturers of England with belligerents, but simply to prevent hostile expeditions from the British shores. Any construction of the act which would extend its prohibitions to the building of ships, would be equally applicable to the manufacture and sale of munitions of war. This was so obvious that Lord John Russell himself at first admitted that the seizure was a stretch of the law, and that it might be necessary to apply to Parliament for an extension of its provisions, and for indemnity against the consequences of an act justified by the necessities of the hour. The English press, accordingly, were divided between those who were in favor of such extension, and those who opposed it; none of them, at least of the metropolis, except the *Daily News*, insisting upon more. The English lawyers, with whom I conversed upon the subject, told me that the question was too plain for argument, and the seizure was illegal. Under these circum-

stances, the case came on to be tried before the Lord Chief Baron Pollock, and his charge to the jury in accordance with this view of the law was universally approved by Parliament, the press, with the exception suggested, and the people. In the meantime, however, between the trial and the hearing in *banc*, a change came over the spirit of their dreams. At the trial, the Southern star was in the ascendant, and it was generally thought in England that the campaign of the ensuing summer would end in the capture of Washington. Before the hearing in *banc*, the South had met with disastrous reverses. Gen. Jos. E. Johnston had contrived to lose Vicksburg, Port Hudson and Middle Tennessee, and Gen. Lee had been driven back at Gettysburg. The English government began, very naturally, to think that the North would triumph, and that it was advisable, in view of such a contingency, to keep on good terms with the government at Washington. Accordingly, the government changed its tone, Lord Russell bowed in meek submission to Mr. Seward, and made his famous Blairgowrie speech; the Times, which had been talking with great boldness of the independence of the English Judiciary and the rights of British labor to work for all the world, began to "roar you as gently as any sucking dove," and to eat its own words with what appetite it could. Of course, the smaller fry of newspapers generally followed suit. All the influence of the government, and all the power of the press, was brought to bear on the court for a reversal of the decision. It was felt that an application to Parliament for an extension of the law would be an act of too abject a servility for even scared John Bull. Two of the four judges yielded to this pressure, each, however, upon a different ground. One of them thought that the question of the intention of the builder to furnish and equip the Alexandra, had not been sufficiently left to the jury. The other, Baron Channell, went the whole hog, and argued that as the act forbade the furnishing and equipping a ship for hostile purposes, any peculiarity of a vessel in its construction which showed that it was destined for warlike uses, even the shape of its keel, was a violation of the law. The consequence of this "judicial legislation" would be, of course, to extend the prohibition of the act to the building of ships for a belligerent, about which the statute itself was entirely and significantly silent. If the case had not gone off afterwards upon a technical point, there is little doubt that a majority of the judges would have yielded to the pressure of the government, and sustained Baron Channell. It is certain, at any rate, that Mr. Justice Crompton, of the Court of Common Pleas, subsequently

charged a grand jury in accordance with Baron Channell's opinion, and as Mr. Justice Mellor, of the Queen's Bench, was present to assist him on the occasion, it is to be inferred that he also concurred. It is very true, that the government may have selected these two judges for that duty, for the very reason that they could count upon their support. That the courts were not unanimous is sufficiently evidenced by the settlement of the cases of the Liverpool Steam Rams by the purchase of those vessels by the government.

That the English government and English courts did yield to the exigencies of the hour is certain, but it is altogether a different question whether such yielding should be characterized as "base subserviency," or prudent statesmanship. They had reasonable ground to fear that the North might seize, at that juncture, upon any decent pretext to go to war with them, in the hope of thereby healing their own domestic differences. England had nothing to gain, and every thing to lose by such a war, and her government was justified in making large concessions to avoid it. It shows the practical good sense of her ruling classes, not to allow a mere point of honor to stand in the way of avoiding a great national calamity. Upon this ground, the act of her statesmen in stretching the law, and the act of her judges in sustaining them, may be justified. But it is ridiculous to talk about English impartiality after such a palpable violation of law to the prejudice of the feebler belligerent, or to brag of the stern independence of her judiciary, when they are just as pliable as similar material, in like circumstances, all over the world.

All travelers, up to a recent period, have agreed in what they called the subserviency of English Judges to the Aristocracy. Even Fenimore Cooper, in his letters from England, does not hesitate to say that if a member of the aristocracy were brought up before a judge for assaulting a policeman, the court would read the latter functionary a lesson for interfering with the noble Viscount, Earl or Duke, as the case might be. Mat. Ward, and French writers of a later date, are far more plain spoken. That the feeling to which these writers refer exists, and sometimes exhibits itself in overt acts of the judiciary, is indisputable; but it has been wrongly characterized by so depreciatory an epithet as "subserviency." It is the homage which the English of all classes pay to aristocratic rank, and which is the growth of a thousand years. The judge who would treat a noble peer in the same manner as he would treat a street rowdy, or even an honest day laborer, for a petty misdemeanor, would shock the public feeling of the whole nation. The judge has

the same feeling himself, and his action will, of course, to a certain extent, be governed by it.

Besides, the meshes of the law, no doubt, are as feeble now as in the days of Shakespeare, to resist wealth and rank combined. The result of the court martial of Col. Crawley, the escape of Townley from the gallows, than whom there never was a man who more richly deserved it, the settlement of the *crim. con.* suit against Lord Palmerston, and other cases which might be cited, show that wealth and rank have some immunities in an aristocratic government that do not belong to ordinary mortals. But is not wealth alone equally efficacious in some countries we wot of?

Straws, it is said, show which way the wind blows, and little incidents serve to illustrate a general rule as well, sometimes, as great events. An American friend while traveling through England put up at an Inn near Oxford. While lounging about the public room, a young gentleman came in and took up a little child of the landlady and went out with it. Something in his appearance, and the excessive politeness with which he was received by the only other person in the room, induced my friend to ask the latter who the young gentleman was. The answer was the Duke of —, (the title has escaped me and is not material.) This person left the room also. Shortly afterwards the landlady came in and inquired for her child. My friend informed her that the Duke of — had taken the child out. "And pray," says she, "how did you know it was the Duke?" "I was told so," said my friend, "by the *gentleman* who was in the room at the time." "What gentleman?" asked she. "The gentleman who has been here all the time, dressed so and so." "Why, bless your soul," exclaimed the landlady, "he's no gentleman; he's my husband!"

The English do not use the word "gentleman" in the indiscriminate sense in which we use it in America. In the same way, the word Esquire, which with us is a mere form of address, carries with it some meaning in England. In fine, all the gradations of rank are still recognized. Each grade may be content with its position, or, which is far oftener the case, may strive to rise above it; but it zealously guards against encroachments from below. Any leaning which the courts may show to rank is not, in reality, flunkeyism, but respect—called for by the usages of society and public opinion.

The English can justly boast of the recent changes in their laws, and in the administration of justice. They have swept away the old land law, and have rendered useless much of the abstruse learning

of Fearne and Sugden by a few plain statutes. They have simplified the proceedings of the courts of Chancery, and have assimilated the administration of equity law to that of the common law by allowing *viva voce* testimony, and trial by jury; and they have obliterated, at one fell swoop, the countless niceties touching the competency of witnesses, by doing away with objections on the score of interest. From a recent speech of Lord Chancellor Westbury in the House of Lords, it appears that a commission is now engaged in gathering and systematically arranging the statutes in force, omitting those which are repealed, obsolete, or useless. The Lord Chancellor intimated that this work should be followed by an effort at codification. He expressed himself strongly in favor of this course, but, even with the aid of such a life-long reformer as Lord Brougham, and such a philosophical jurist as Austin, it will be a long time before the English bar, as a body, will consent to such a course. They are not at all inclined to so radical an innovation.

The Lord Chancellor proposed another labor in the same direction, which is far more herculean, and not so essential. He proposed that a committee should be appointed to sift, and republish the reports, omitting all overruled, obsolete, or doubtful cases, or parts of cases, with a legislative prohibition against the portions omitted being cited, or in any way referred to. In this way, he thought, the volumes of all the reports could be reduced to one or two hundred. The labors of Tribonian and his compeers would sink into insignificance before the successful execution of such a task. But the project may at once be dismissed into the limbo of impossibilities.

The Lord Chancellor threw out another suggestion that fairly startled me, coming from such a source. He said, the codification of the laws ought not to be undertaken until another step had been made in the amendment of the judicial system by doing away with the "absurd distinction" (I think these were his words,) between law and equity; not, he added, in the forms of administration of these two branches of the law, but in the legal principles to be administered. In other words, while it might be desirable to retain the forms of administering equity for such matters as properly fall within its jurisdiction, there ought to be but one law for a court of Chancery and a court of law. In my labors in the preparation of the Code of Tennessee, I acted, as will be seen from my report to the Legislature of 1857-8, upon this very idea. There can be no good reason why the law applicable to any given subject should be different in one court from what it is in the other; but the forms of ad-

ministering the law may be varied to suit the particular class of cases taken cognizance of in such court. It would be difficult to apply ordinary pleadings at law and jury trial to a complicated partnership account, or to the marshalling of assets among a number of adverse claimants, but the law governing these subjects should be the same whether tried according to the forms of law or the forms of equity.

"I have practiced at the bar," says Lord Campbell in his *Lives of the Chief Justices*, ch. LIII, "when no case was secure, no case was desperate, and when, good points being overruled, for the sake of justice it was necessary that bad points should be taken; but during the golden age (Tenterden, C. J., Bayley, Holroyd, and Littledale,) law and reason prevailed. The result was confidently anticipated by the knowing before the argument began, and the judgment was approved by all who heard it pronounced, including the vanquished party. Before such a tribunal, the advocate becomes dearer to himself by preserving his own esteem, and feels himself to be a minister of justice, instead of a declaimer, a trickster, or a bully." Alas, such "golden ages" are of rare occurrence and limited duration. But I may justly say, that after a careful attendance on all the different courts, and after hearing causes disposed of in all the forms of administering justice, the general impression was favorable to the body of English Judges. The Court of Queen's Bench struck me as coming nearest to Lord Campbell's ideal, and I always witnessed its proceedings with undiminished delight.

I give another extract from Lord Campbell's work, purporting to be *ex-relatione* of Mr. Justice Talfourd, as preliminary to a scene which I myself witnessed in the Court of Queen's Bench.

"My Lord!" exclaimed Henry Hunt, the famous demagogue, with his peculiar air between that of a bully and a martyr. The bar stood aghast at his presumption in thus staying his Lordship (Chief Justice Ellenborough) who was about to retire after having rushed through the list of cases for the day, like a rhinoceros through a sugar plantation. The ushers' wands trembled in their hands; and the reporters who were retiring after a very long day, during which, though some few city firms had been crushed into bankruptcy, and some few hearts broken by the results of the causes, they could say that nothing had been afforded of the slightest interest except to the parties—rushed back and seized their note books to catch any word of that variety of rubbish which is of "public interest." My Lord paused and looked thunders, but spoke none. "I am here, my Lord,

on the part of the boy Dogood," proceeded the undaunted Quixote. His Lordship cast a moment's glance on the printed list, and quietly said, "Mr. Hunt, I see no name of any boy Dogood in the paper of causes," and turned towards the door of the room. "My Lord," vociferated the orator, "am I to have no redress for an unfortunate youth? I thought your Lordship was sitting for the redress of injuries in a court of justice." "Oh, no, Mr. Hunt," still calmly responded the judge, "I am sitting at *Nisi Prius*, and I have no right to redress any injuries, except those which may be brought before the jury and me, in the causes appointed for trial." "My Lord," then said Hunt, somewhat subdued by the unexpected amenity of the Judge, "I only desire to protest." "Oh, is that all," said Lord E., "by all means protest, and go about your business." So Mr. Hunt protested and went about his business, and my Lord went unruffled to his dinner, and both parties were content.

The following scene occurred at the close of the Hillary Term of the Court of Queen's Bench, 1864, sitting in *ban*, I being present. The Judges had disposed of the last case on the list, and had risen to their feet to retire, when one of the spectators sitting in an upper bench, and, as it happened, next to me, arose and startled me, if not one else, by suddenly addressing the court with the usual formula, "My Lord." He was an old man, with hook nose and bald head, dressed in grey cloth somewhat the worse for wear. His appearance was that of a gentleman a little under the weather, but retaining traces of gentility and intelligence. He held in his hand a formidable roll of paper, which he proceeded to unfold. "You must come down to the floor of the chamber, sir," said his Lordship, C. J. Cockburn. "I thought, my Lord, I had a right to address your Lordship from this seat." "No sir, you have no such right. Persons who are not barristers, are required to address the court from the floor below the bar. I have never known any other practice to prevail." Thereupon, my neighbor made his way through the crowd to the floor below the bar. In the meantime, the other judges, who no doubt knew what would follow, slipped out and left the Chief Justice standing alone, and manifestly ready to be off himself as soon as he could. The old gentleman deliberately put on his spectacles, unfolded his papers, and began to read in a voice which indicated complete self-possession; and in a manner showing that public speaking was not new to him, and that he fully understood the proper mode of address. From his statement of facts, it appeared that he had brought a suit in the Court of Queen's Bench some years before against several par-

ties, one of whom was not served with process, that the declaration was filed against those who were served, omitting the other, but that, when judgment was taken, the clerk in entering it had of his own accord, without any authority, seen proper to include the defendant not served; in consequence of which wrongful act, as the speaker styled it, he had been mulcted in heavy costs. The old gentleman quoted statutes and cases to show that the act of the clerk was wrong, and for which he, an innocent party, should not be made to suffer. He was quite vehement in his denunciations of the clerk. He spoke in praise of the old practice of the courts, and was warm in his abuse of the new-fangled rules under which everything was, he said, going to ruin. The Chief Justice brought him back once or twice from these diversions, calling him by the name of Mr. Cobbett, from which, as well as from what subsequently transpired, it was obvious that the speaker was not a stranger to the court. I learned afterwards that he was a son of the famous William Cobbett, the Peter Porcupine of American notoriety. After listening with commendable patience for twelve or fifteen minutes, standing all the time, the Chief Justice seized the opportunity when the speaker was beginning to repeat himself, and said in a sharp decided voice, "I can not stay here all day, Mr. Cobbett, to listen to a matter which has now been brought by you six times before this court. State your point at once, sir, and it shall be decided." Upon this, the old gentleman began to fold up his papers, and remarked, "I see, my Lord, that I can not expect anything at the hands of this court, and I withdraw my application." He had scarcely finished, when the impatient Chief Justice was again stayed by a sharp feminine voice, from a slovenly dressed old woman, who suddenly thrust herself in the place just occupied by Mr. Cobbett. Her back being turned towards us, and her voice drowned in an old-fashioned stove pipe bonnet, I could not catch the sense of the words which she poured forth with great volubility, and in a high key. The Chief Justice presently interrupted her by asking her, sharply, what motion she wished to make. She did not wish to make any motion, but—and here the articulation was again lost in a general clatter. "If you have no his motion," interrupted his Lordship, "I can not hear you." "Very well, my Lord; then I will take my leave," and she flounced away in the style which seems peculiar to strong-minded women. Her place was immediately occupied by a young German, who commenced speaking in very broken English, but with great vehemence. The Chief Justice interrupted him by asking if he

had not written a letter to him (the C. J.) that morning, and handed it to his clerk. "Yes, my Lord." "Sir," said his Lordship, "you have done very wrong, and have been guilty of a contempt of court, and I have a great mind to commit you for it. You have no business to write me letters about your case." "But, my Lord, I want my case tried." "I suppose you do, sir, but you know very well it can not be tried until the return of a commission to take depositions in Germany, to the order for which you gave your consent, and which can not be executed for a month. When you have a right to complain of delay you will be heard, but you can not be heard now." And, thereupon, his Lordship glided from the room, leaving the cryer to drown the voice of the dissatisfied German, which he did in the usual formula of adjournment, concluding with "God save the Queen and my Lord Chief Justice."

Singularly enough, not one of the London newspapers gave any account of this curious winding up of the term, although one would have supposed that it contained matter, to use Lord Campbell's words, "of public interest."

The papers were, however, afterwards filled with the account of the trial of the case of the German who figured in the scene. It turned out to be an action against Lord A. Loftus, the English Ambassador at Berlin, the precise nature of which I have forgotten, and the commission to Germany was to take the deposition of Baron Von Arnim. The first witness introduced by the plaintiff, who managed his own case, was the English Secretary of Foreign Affairs, Earl Russell. It must be admitted that the plaintiff contrived to "meddle and muddle" his case much after the style of diplomacy of the noble Earl, to whose testimony he was, therefore, fairly entitled. The jury, however, found for the defendant.

W. F. COOPER.

Nashville, Tenn.

Dower.--Devise to A., and if he die without issue, then to B.

JOHN WILSON'S WIDOW vs. ROBERT WILSON'S DEVISEES.*

This is an ejectment against the defendants by the widow of John Wilson to recover her dower of the tenants in possession, as executory devisees, under the will of Robt. Wilson. Ejectment did not lie for the recovery of dower at common law, for the widow had no right of entry on the lands of inheritance of the husband whereof he was seized at any time during the coverture. She was, indeed, entitled to dower of all such lands, but she had but the *mere right of property* to one-third of them for her life, but no *right of possession* thereof till the heir of the husband assigned dower to her. If the heir, whose duty it was to assign the dower, failed or refused to assign it in a reasonable time, she could only redress the wrong by instituting one of those real actions known as the writ of right of dower, or the writ of dower, *unde nihil habet*. These two ancient writs have escaped the general demolition in England of the old droitual actions founded upon the *mere right*, by Stat. 3 and 4, Will, 4: See Steph. on Pl., 9 and 10. In Virginia, as generally in the United States, *all* real actions are abolished, or have become obsolete, and have been substituted by the modern action of ejectment, improved and simplified by stripping it of that strange string of fictions which so remarkably distinguished this action, and with a view of "disentangling justice from nets of form:" See 1 Mat. Dig., 644, note of Revisors of Code. The action of ejectment may now be brought by the widow to recover her dower of all lands of inheritance whereof her husband was seized at any time during the coverture, "unless her right to such dower shall have been lawfully barred or relinquished." C. V., ch. 135, § 29, and ch. 110, § 1—same sections cited 1 Mat. Dig., pp. 556 and 595.

Upon the issue joined of "not guilty," in accordance with this statute, the jury have found the following

SPECIAL VERDICT.

"We, the jury, find that the testator, Robert Wilson, died on the 10th day of June, 1851, having first made his will, which was duly admitted to probate in the County Court of Rockbridge, and that by his will the said testator devised to his son, John Wilson, one undivided moiety of his home tract of land lying on the waters of Collier's Creek, including the Mansion House. We further find, that the said will contained the following clause, to-wit: 'It is my will and desire, that *if my said son, John Wilson, shall die without issue*, my other children shall take the said land hereby devised, in equal

*Opinion of J. W. Brockenbrough, Judge, in the case of John Wilson's widow vs. Robert Wilson's devisees, in the Moot Court of "Washington and Lee University;" Session of 1872-3.

shares.' We further find, that the said devisee, John Wilson, died on the 4th day of October, 1852, without issue, leaving his widow, Jane Wilson, the plaintiff in this action, him surviving, and that the other children of the testator are the defendants in this action; and that immediately after the death of said John, the defendants claiming to hold the said land as executory devisees thereof, entered on the same, and have continued to hold the same adversely against the plaintiff's claim to dower of the said tenement, though she has demanded assignment of dower thereof; and these are all the facts found by us. We further find, that if upon the state of facts so ascertained, the plaintiff has a legal right to demand her dower of said tenement, the law be for the plaintiff, then we find a verdict for one-third part of said tenement, having reference to quantity and quality thereof, to be assigned by a commissioner to be appointed by the court, and assess her damages for withholding possession of said tenement, at the rate of \$200 per annum from the entry of the defendants till the same be fully delivered up to her. But if the court shall be of opinion that the law arising upon the said facts be for the defendants, then we find for the defendants, and for their costs thereof in this behalf expended.

G. A. BAKER, Foreman."

The essential words of the will of Robert Wilson, father of the said John Wilson, and of these defendants, are: "It is my will and desire that if my *said son, John Wilson, shall die without issue*, my other children shall take the same in equal shares."

John Wilson did die without issue, in the year following the death of his father, Robert Wilson, the testator, and the other devisees entered.

The general and ultimate question arising on this special verdict is: Is the widow, who is plaintiff here, entitled to recover her dower under the above cited clause of the will of Robert Wilson, or are the other devisees, the defendants in this action, entitled to the whole of the land devised to John, relieved of the dower of his widow, the plaintiff in this action?

To solve this ultimate question intelligently and satisfactorily, we must ascertain what estate the husband, John Wilson, took under his father's will, since his widow claims under a derivative title through him. Did John take an estate of inheritance? For, if not, she can have no legal claim to dower. If John did take an estate of inheritance, was it an estate of inheritance to which dower was incident, in the event which has occurred, to-wit: the death of John

without issue surviving him, or born to him within ten months thereafter? If the said John did so die without issue surviving him, was the estate limited to him a fee simple conditional at the common law? or a fee-tail, under the statute *de donis*, enlarged into a fee-simple by operation of the Acts of 1776 and 1785, and so, defeating the contingent limitation over to the defendants? or was it a good executory devise to them, under the operation of the Act of 1819? or, finally, if the ulterior estate so limited to them was such valid executory devise *subject* to the dower of the plaintiff or relieved of the encumbrance of dower, as incident to a determinable fee, now actually determined by the death of the first devisee, without issue surviving him.

It is, therefore, indispensable to a correct solution of the issue joined in this cause, that we should enter upon an extensive field of inquiry. The special verdict, having ascertained the facts found by the jury, and the jury having referred the question of law arising upon it, to the court, we are to adopt these facts so ascertained as the basis of the judgment of the court now to be rendered. Dower, like Curtesy, is a freehold interest in for life only, but it is founded upon, and derives its existence from, an estate of inheritance. We must, therefore, ascertain from what sort of freehold estate of inheritance, in the case at bar, is the right of dower derived?

Dower is a life estate, created by the mere operation of law. It has no *original* existence. It is a mere fungus growth of the law, and like the mistletoe, it is engrafted upon an estate larger than itself—upon an estate of inheritance. It exists where a husband is seized of such an estate and dies in the lifetime of his wife. Blackstone thus defines dower at common law: "Tenant in dower is when the husband of a woman is seized of an estate of inheritance and dies; in this case the wife shall have the third part of the lands and tenements whereof *he* was seized, at any time during the coverture, to hold to herself for the term of her natural life:" Book 2, p. 129, §1. This definition is precisely adopted in Virginia, except that his common law right of dower is *enlarged* in two essential particulars:

1. Her right of dower, here, is extended by declaring that where a husband, or *any other to his use*, shall have been entitled to a *right of action or entry* in any land, and his widow would be entitled to dower out of the same, if the husband or such other had recovered possession thereof, she shall be entitled to such dower, although there shall have been no such recovery of possession: C. V., chap. 110, §2. This provision entitles the widow to dower of lands of

inheritance of the husband whereof he was not even *seized in law* during the coverture.

2. The widow is entitled to dower of equitable or trust estates of the husband, equally as of his legal estates: C. V., ch. 116, §17.

Estates of inheritance, subject to the wife's dower, were of several varieties, embracing both absolute and limited fees. These were the fee-simple, absolute and pure, qualified or base fees, and the fee-simple conditional at common law. In addition to these three varieties of fee-simple estates, two other kinds of estates were created by statute, the first of which was an estate tail, arising under the statute *de donis conditionalibus*, or Westminster 2, 13 Ed., 1; and the second, a fee-simple determinable and determined by the comparatively modern estate of inheritance, arising under the construction of the Statute of Wills, 32 and 34 Hen., 8, known as the *executory devise*, and particularly of that form of executory devise by which a fee-simple, or other less estate, may be limited, by will, to take effect after a previous fee-simple limited by the same will, and on the same land, on a future contingency: 2 Bl. Com., 172-4. (To exclude a conclusion, it is proper to say, that we do not, in this place, refer to a large class of executory interests, known as future, secondary, contingent, springing or shifting uses, arising under the Statute of Uses, 27 Hen., 8, so lucidly discussed by Williams in the 3rd chapter of his work on Real Property, pages 265, 295. I wish to be understood as limiting myself to the discussion of the fee-simple determinable by the *executory devise*, proper, and not as embracing all the varieties of executory *uses*, though they essentially depend upon the same principles.)

We are, then, specially to speak of the five varieties of estates of inheritance to each of which the right of dower was evident, under the common law, or by statute. Of these we are now to speak and on which I am to present my views. The discussion of the intricate and abstruse questions presented on this record, has been most creditable to my young friend, the counsel engaged in the argument of the cause. It has been marked by much learning, research and ability, which would have done credit to older heads than any of yours. As all the counsel on either side concur in all the propositions discussed, except the last, I will discuss those preliminary points with as much brevity as possible, and address myself mainly to the only really controverted question arising on the special verdict. We notice them in the order in which they were discussed at the bar.

(1.) The fee-simple absolute.

A fee-simple estate, absolute and pure, is the largest estate which any subject or citizen can take. It is the whole estate, and when it is once granted, confers an unlimited power of alienation on the feoffee, grantee, bargainee, or devisee, in any of the various forms of alienation. Every restraint upon alienation is inconsistent with the nature of such an estate, and if a partial restraint be annexed to a fee-simple absolute, as, for example, a condition not to aliene for a limited time, or not to aliene to a particular person, it is *repugnant* to the estate granted, and so, it is *void*. To the creation of any estate in fee-simple, at common law—and this principle was equally applicable to the fee-simple absolute, the qualified or base fee, and the fee conditioned at common law—the use of the word *heir*, or *heirs of the body*, was absolutely indispensable. No equivalent words, however clear the intention to convey an estate in perpetuity, could compensate for the want of the magic word—*heirs*! and a feoffment or grant to a man *forever*, or to him and his assigns forever, or while grass grows and rivers run, or to three Indian chiefs and their generation, as long as the waters of the Delaware shall run, could not pass a larger estate than an estate for life: Wms. on R. P., 134; and Rawles' Not., 1; 4 Kent, 516.

This rigid and extremely technical rule of the ancient common law, is of feudal origin, and has in modern times been softened by many exceptions. We need only refer to the most striking example of exceptions to the rule, that of a will of lands, under the Statute of Wills, 32 and 34, Hen. 8. But even in the construction of that statute in England, though any form of expression shewing a clear *intent* to pass a fee, would be equivalent to the use of the word *heirs*, in a common law conveyance, still *some words of perpetuity* were necessary to create a fee even in a will. A devise of land in general terms, without words of limitation, or any ulterior devise of the same land to another, passed only a life estate to the devisee: 2 Bl. Com., 108. But this absurd technicality has, at last, been abolished by statute in England: Wills Act, §28, and it is declared "That when any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will: Wms. on R. P., 194-7. The same rule was applied in Virginia as early as 1785: C. V., Ch. 116, §8. The only difference between the Virginia and the late English statute is, that the former applies as well to *deeds* as to wills, while the latter restricts it to *wills*;

precisely the *same language* being used in the two, with the exception specified. The rule of Virginia has been adopted in many of the States, while, in some others, the words dispensing with words of limitation to convey a fee-simple, is limited to wills, leaving *deeds* to be construed as at common law: 4 Kent's Com., 7-8.

(2.) The second kind of fee is called a base or qualified fee. It is a fee, because peradventure it may endure forever, but it is called a *base* fee, because the estate is liable to be determined by some collateral act or event, without the aid of a conveyance, circumscribing its continuance. As a grant to A. and his heirs, tenants of the manor of Dale, whenever A. or his heirs cease to be tenants of that manor, the grant of the estate is entirely defeated: 2 Bl. Com., 100; 4 Kent, 9-10. Of base fees we will hereafter speak in connection with executory devises, or that variety of future estates in land, taking effect after a preceding fee. In all such cases, embracing a large variety of determinable fees, the first fee, thus determined by some collateral event, belong to the class of base fees, according to the classification of Ch. Kent, so far from base fees being obsolete, as has been supposed, they are flourishing in full vigor, under the modern designation of executory devises.

(3.) The third kind of fee is known as the fee-simple conditional at common law. These are defined by Blackstone: "A fee restrained to some particular heirs, exclusive of others as to the *heirs of a man's body*, by which only his lineal descendants were admitted, to the exclusion of collateral heirs:" 2 Bl. Com., 110. If the grantee died without issue, the land reverted to the grantor. But if he had the specified issue, the condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alienate the land, and bar not only his own issue but the possibility of a reverter: 4 Kent, 11. This estate was a fee-simple, because the whole estate was vested in the grantee. The grantor had only a scintilla of right, a *possibility* of reverter, but no *reversion*, a mere *possibility* and *no estate*.

The evident design of these limitations was to restrain the donees from disposing of the estate thus given. But the general propensity which prevailed about the reign of Edward I., to favor a liberty of alienation, induced the judges to construe limitations of this kind in a very liberal manner. Instead of declaring that the estates must descend to those heirs, and to none others, who were particularly described in the grant, according to the obvious intention of the donors and the strict principles of the feudal law, that the donees should

not, in any case, be enabled by their alienation to defeat the succession of those who were mentioned in the gift, or the donor's right of *reverter*, they had recourse to an ingenious device, taken from the nature of a condition. Now it is a maxim of the common law that when a condition is once performed it is henceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. The judges, reasoning upon this ground, determined that these estates were conditional fees—that is, were granted to a man and the heirs of his body upon *condition* that he had such heirs: I. Lomax's Dig., 25. To defeat this subtle finesse of construction, as Blackstone calls it, whereby the intention of the donors was entirely defeated, the nobility, whose object was to perpetuate their possession in their own families, had address enough to procure the enactment of the statute.

(4.) *De donis conditionalibus*, creating the new kind of estates of inheritance, called *estates tail*.

The estate tail was not a fee-simple. An estate tail was an estate of inheritance created by the statute *de donis*, 13 Edw. I., otherwise called the Statute of Westminster, 2. The operative words were, an estate limited to *a man and the heirs of his body*, using the identical language of the old fee-simple conditional at common law. The fee-tail, like the old fee conditional (which was entirely superseded by the statute *de donis*), was an estate limited to a man and the heirs of his body, general or special, male or female, and not to his heirs general. The statute *de donis* created two estates, a particular estate, called an estate tail, in the donee, and a reversion in the donor. The statute took away the power of alienation on the birth of issue. Where the donee had a fee-simple before, he had, by the statute, what was denominated an estate tail; and where the donor had but a bare *possibility of reverter* before, he had, by construction of the statute, a *reversion* or fee-simple expectant upon the estate tail. The donee could not bar or charge his issue, nor, for default of issue, the donor or his heirs; and thus a *perpetuity* was created. The policy of the common law, as expressed by the judge, was defeated. The law abhorred perpetuities as strongly as nature is said to abhor a vacuum! But the true policy of the common law was deemed to be overthrown by the statute *de donis*, establishing those perpetuities. They were secret conveyances, and on the death of tenant in tail, though he was not chargeable with waste, the estate was subject to dower and courtesy, against the issue in tail, or against the reversion of the donor and his heirs, if the issue of that tenant was exhausted, no favor

being shown to the creditors or purchasers of tenant in tail, and the writs of *formedon in descender*, remainder, or reverter, brought by the issue in tail or reversioner, was effectual to strip them of their *bona fide* purchases or liens. The tenant in tail was the ostensible fee-simple owner of the estate, and credits were extended to his dupes on the faith of that ownership; but on the death of the tenant, their reasonable hopes and expectations turned to dust and ashes on their lips. There were no recording acts to protect purchaser and creditor. These, and numerous other inconveniences enumerated by the text writer, were the bitter fruits of these fettered inheritances, and to be relieved against them, many efforts were made in Parliament, but all in vain. The feudal barons of those days set their faces like flint against them, because estates tail were not liable to forfeiture for treason or felony, nor chargeable with the debts of the ancestor, nor bound by alienation. At length, in Tallarum's case, 12 Edw. IV., that relief was obtained against this great national grievance "by a bold and unexampled stretch of the power of judicial legislation:" 4 Kent, 13. By the introduction of common recoveries estates tail were effectually barred by a piece "of solemn juggling, which could not long have held its ground, had it not been supported by its substantial benefit to the community; but as it was, the progress of events only tended to make that certain which at first was questionable; and proceedings on the principle of those above related, under the name of suffering common recoveries, maintained their ground, and long continued in common use as the undoubted privilege of every tenant in tail. The right to suffer a common recovery was considered as the *inseparable* incident of an estate tail, and every attempt to restrain this right was held void!" Wms. on R. P., 44.

Estates tail, created by the statute *de donis*, with their "inseparable incident," the common recovery, as a means of effectually barring them, were introduced into the American Colonies, with other parts of the English jurisprudence. Upon the settlement of the Colony of Virginia, the statute *de donis* was, of course, a part of the law of the land, but Chancellor Kent is not quite accurate in saying that estates tail subsisted in full force before our Revolution, and were subject here, as in England since Tallarum's case, to the *power of being barred by a fine or common recovery*: 4 Kent, 14. Fines and recoveries were indeed in force in Virginia at the first settlement of the Colony, but they did not *continue* in force till the Revolution. On the contrary, the policy of the statute of entails was greatly favored

in that colony. The colonists brought with them from England both estates tail and fines and recoveries, as a means of barring them, as a part of the colonial system of laws. But as early as October, 1705, it was enacted by the Legislature that *fines and recoveries*, and every other act for the purpose of avoiding and defeating estates tail, except only by an act of the General Assembly, *were utterly null and void*. In 1727, an act of Assembly was passed allowing slaves to be entailed: 1 Lom. Dig., 31-2. The evils of entails in Virginia were, therefore, aggravated by the abolition of fines and recoveries, and by making slaves—chattels and not *tenements*—the subjects of entail. Estates tail continued to flourish in Virginia from the last named periods till their extinction on the 7th of October, 1776, when they were merged in the fee-simple absolute by express statute.

By the Act of Virginia of the 7th of October, 1776, amended and enlarged by the act of 1785, it was enacted that "every estate in lands so limited, that as the law was on the seventh day of October, 1776, such estate would have been an estate tail, shall be deemed an estate in fee-simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee-simple, created by technical language:" Acts of 7th of October, 1776 and 1785, revised C. Va., ch. 116, §9.

By the express terms of these most important statutes, we must ascertain what words were necessary to the creation of a fee-tail by the law "as it aforetime was," that is, by the law of England before the Revolution—since every limitation which, by that law, would have constituted an estate tail, was declared to be instantly transmuted into a fee-simple absolute and pure, and thereby rendering every ulterior limitation "mounted" or based upon it, void and of none effect; unless such ulterior limitation, after a preceding fee-simple, is so limited as to make it a good executory devise.

We have already seen that to constitute a fee-tail under the statute *de donis*, the technical words, *to a man and the heirs of his body*, were indispensable. Such an estate in fee-tail could only be created by *deed* or *grant* when the statute *de donis* was passed, and for some centuries afterwards. But a great change in the law of *estates tail* was wrought by the Statute of Wills, 32, Henry VIII. Great indulgence has always been extended in the construction of wills, so as to ascertain and give effect to the intention of the testator. The intent of the testator is the *will* of the testator, and if that intent be ascertained from its language, is lawful, and offends against no rule of law, it must govern with absolute sway. The authorities in support

of this elementary rule are too numerous for citation: See 2 Mat. Dig., 888-9, and note of editor. But this fundamental rule in the construction of wills is sometimes controlled by certain subsidiary rules, in the application of which the testator's intention is defeated. "Certainty can not be obtained without uniformity, nor uniformity without rule." A striking example of one of those rules of law governing the interpretation of wills, in determining the effect of a certain form of expression, is the phrase, *dying without issue*. If the testator make a devise of lands to A. and his heirs, and *if he die without issue*, then to B., does A take an estate tail, with a good remainder to B., or does A. take a fee-simple, with an executory devise, to B? On the latter hypothesis, is it a good executory devise, or is it void, because to give it effect would offend against the rule against perpetuities?

This question has been set at rest by a long series of cases—decided in England before the American Revolution—too well settled to be now drawn in question. It has long since become a settled rule of law. In every case of the sort, beginning with *Chadock vs. Cowley*, 3 Cro. Jac., 695, and very many later cases, it is settled law, that in the case here put, A. takes an *estate tail*, with a good remainder, over to B. These old English cases are reviewed by Carr, J., in *Bells vs. Gillespie*, 5 Rand., 278-80, with great learning and ability. The same Judge reviews the whole series of Virginia decisions on the same point, commencing with *Carter vs. Tyler*, 1 Call, 143, and ending with *Goodrich vs. Harding*, 3 Rand., 280. These cases, English and Virginian, present an unbroken current of authority. In each of the cases reviewed, there is an element not found in the case at bar. In each, the contingency of dying without issue is coupled with an ulterior limitation to him in remainder, who is designated as the *survivor* of the first taker. It was uniformly held that the first taker took an estate tail with remainder over, and not an executory devise. The American cases, out of Virginia, are stated with great fullness and clearness by Rawle, in his note to Williams on R. P., 198. In some of the cases cited by him, the limitation over to the *survivor* was held to be a good *executory devise*, but Mr. Rawle thinks that this course of decision is contrary to the weight of authority in England and America. It is not a little singular that in the whole of his admirable note he does not cite a single Virginia authority, though he refers to our Statute of 1819, and the Rev. Stat. of New York, reversing the ancient rule, and approves it too. But of the Virginia Act of 1819-20, I will hereafter speak.

In all the cases reviewed, the true point of inquiry is: Whether the limitation over, if the first taker *dies without issue*, is to take effect after a *definite* or *indefinite failure of issue*. If the ulterior devisee is to take, if the first die without issue, *living at his death*, then the first takes a fee-simple with a good *executory devise*, over, for though it be a fee upon a fee, and bad as a remainder, because no *remainder* can be limited after a fee simple, yet it is a good *executory devise*, because it does not offend against the rule against perpetuities, and must, if ever, take effect within a *life in being*, and *twenty-one years*, and the *extreme period of gestation in utero*, which is fixed by our statute at ten months.

If an express estate be given to A. and his heirs, and subsequently, in the same will, there is a limitation to B. and his heirs, if A. *die without issue*, the effect is a little curious. If A.'s express estate in fee is followed by the words of implication quoted above—if he *die without issue*—then to B. and his heirs, the effect is, under the established rule of construction, to *reduce* A.'s fee-simple, or *cut it down*, as it is expressed, to a fee tail. So, *e converso*, if the first estate to A. is *for life*, but if he *die without issue*, then to B. and his heirs, the express estate to A. *for life*, by force of these words of implication, is *enlarged* by force of these same words of implication into a fee-tail. The two limitations to A. are exactly the same in result—an estate tail is produced in either case—*leveled down* in the first case, and *leveled up* in the second. They meet at the same point—an estate tail in A.—and in either case the ulterior limitation to B. takes effect as a good *remainder* in fee. This construction was necessary in order to make provision for each of the objects of the testator's bounty. If A.'s estate in fee was not cut down to a fee-tail, B.'s estate would be cut off altogether. It could not be good as a *remainder* after a fee-simple, neither could it be good as an *executory devise*, because it is limited to take effect after an *indefinite failure* of issue, and, therefore, it would be *too remote*, and void. It was, therefore, necessary to give B. an estate which would take effect only after the exhaustion of the issue of A., whensoever it might occur. The exhaustion of the issue of A. might occur at the death of A., leaving no issue surviving him, or it might occur at the end of untold generations in the future. This is what the law means by an indefinite failure of issue. But the failure of issue of the tenant in tail is the "regular limit to an estate tail, and the limitation over takes effect as a *remainder* under the operation of the rule that whenever a limitation can take effect as a remainder, it shall not take effect as an *executory*

devise, while the rule against perpetuities is, at the same time, observed, because the right to suffer a common recovery is the inseparable incident to an estate tail, and the restriction upon alienation is, therefore, determinable at the option of the tenant in tail:" Wms. on R. P., 198; Rawles' note, 1.

Ch. Kent, also, explains the difference between a definite and an indefinite failure of issue: "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A., but *if he dies without lawful issue living at the time of his death*, then over.

"An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period within which it must happen. It means the period when the issue, or descendants of the first taker, shall become extinct, when there is no longer any issue of the grantee, without reference to any particular time, or any particular event; and an *executory devise*, upon such an indefinite failure of issue, is void, because it might tie up property for generations. *A devise in fee, with a remainder over upon an indefinite failure of issue, is an estate tail.* * * The series of cases in the English law have been *uniform* from the time of the Year Books down to the present day, in the recognition of the rule of law, that a devise in fee, with a remainder over, *if the devisee dies without issue*, is a fee cut down to a fee-tail; and the limitation over is void, by way of executory devise, as being too remote and founded on an indefinite failure of issue." Ch. Kent here cites the opinion of Carr, J., in *Bells vs. Gillespie*, 5 Rand., 273. Ch. Kent should have added, as Judge Carr did in the cited case, that though the limitation over was void, *as an executory devise*, it would have been good in England as a *remainder* after a *fee-tail*. Why the ulterior limitation over in *Bells vs. Gillespie* was held void as a remainder, after the fee-tail, limited to his son Pleasants, is easily explained.

The same words in a will—a limitation to A. and his heirs, and *if he died without issue*, then to B. and his heirs—having been uniformly construed for centuries as creating an estate tail, the same rule of construction was adopted by the statutes of Oct. 7, 1776, and the amendatory act of 1785, and it was declared "that every estate in lands or slaves, which, on the 7th day of October, 1776, was an estate in fee-tail, shall be deemed from that time to have been, and from thenceforth to continue, an estate in fee-simple—and every estate in lands which since hath been limited, or hereafter shall be lim-

ited, so that *as the law aforesaid was*, such estate would have been an estate tail, shall also be deemed to have been and to continue an estate in fee-simple. And all estates, which, before the said 7th day of October, 1776, if it remained unaltered, would have been estates in fee-tail, and which now, by virtue of this act, are, and will be, estates in fee-simple, shall, from that time, and from henceforth, be discharged of the conditions annexed thereto, by the common law, restraining alienations before the donee shall have issue, so that the donees, or persons in whom the conditional fees vested, or shall vest, had, and shall have, the same power over the same estates, as if they were pure and absolute fees."

I have quoted the whole of this celebrated statute, with all its luxuriance of verbiage, that the counsel may see how sweeping and comprehensive its provisions were! It annihilated estates tail at a single blow, root and branch. It crushed the "hateful exotic," as Judge Tucker called those estates, and was far more effectual than the Common Recovery in Taltarum's case, many centuries before. The expedient of common recoveries, and afterwards of fines, was the result of temporizing judicial policy. It did not destroy estates tail, but only enabled the tenant to do so by a strange system of tedious, vexatious and fictitious proceedings. It *scorched* but did not *kill* the monster. Estates tail flourished, (only with diminished vigor and luxuriance,) after, as well as before, Taltarum's case. All that the judges accomplished in that memorable case was to put it *in the power* of each tenant to bar the estate tail, in his particular case, by his fines, his recoveries, his single and double vouchers, and other incomprehensible jargon, so humorously satirized by Shakspeare in Hamlet.* The bar to an estate tail by the fine and common recovery was perfectly effectual when applied in a particular case, and became, in process of time, the inseparable incident to every estate tail; but it could only be vitalized by a vexatious, dilatory and expensive proceeding, applied to each estate tail. How different from this was "*our great fine and recovery act*," as Judge Cabell happily expressed it, in speaking of the acts of 1776 and 1785! The whole pestilent

*See the grave-digger's scene in Hamlet, where a skull is thrown out from the grave designed to receive the body of the beautiful Ophelia.

Hamlet. There's another: why may not that be the skull of a lawyer? Where be his quiddits now, his quillits, his cases, his tenures, and his tricks? why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? Humph! This fellow might be in 's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries?—*Act V: Scene I.*

brood of estates tail fell, as by the touch of Ithuriel's spear, and at one fell swoop, perished in an instant, by the mere *operation of law*!

Wherever an estate in fee-simple was followed by a subsequent limitation, in the same will, after an indefinite failure of the issue of the first tenant, the first fee-simple, as we have seen, was reduced to a fee-tail, and this construction had prevailed, as a canon of property, from the Year Books, to the advent of the American Revolution. The statute of 1776, in Virginia, discarded the whole of the preposterous fictions of fines and common recoveries, and estates tail perished, by the merger of these estates in the largest estates known to the law, the fee-simple unconditional, absolute and pure!

Estates tail, creating perpetuities, continued in full force in England and her American colonies at the date of this Virginia Act of October, 1776. They were indirectly strangled in England by Judicial, not by Legislative power. But in Virginia they *ceased to be* under the omnipotent fiat of legislative power!

(5.) The fee-simple determined by an executory devise.

Executory devises did not share the fate of estates tail, but have been highly encouraged in the United States generally, and especially by a statute in Virginia, presently to be noticed. The definition of an executory devise, as given by Fearné, is absolutely perfect: "Such a limitation of a future estate or interest in lands * * as the law admits in the case of a will, though contrary to the rules of limitation, in conveyances at common law." (We omit that portion of Fearné's definition which applies to chattels, real or personal, as we have no concern now with any species of executory devise other than that which allows a limitation of a future estate in lands, after a preceding estate in fee simple.)

At common law there can be no valid limitation of a future estate after a fee-simple, but ever since the Statute of Wills in England such limitations, under certain restrictions, have been permitted, under the designation of an "executory devise." The great objection to the estates tail was that they established perpetuities. That evil was endured in England for two hundred years after their creation without any power of abolishing them through an act of Parliament, since the upper house of Parliament steadfastly resisted every effort in that direction. The evil was at length *mitigated*, not *eradicated*, by the curious finesse of the judges in *Taltarum's* case. We have seen how the evil was *exterminated* in Virginia.

THE RULE AGAINST PERPETUITIES.

The evil of a perpetuity, in the case of an executory devise, after

a preceding fee-simple, was remedied by the establishment of a rule restraining the limitation of a fee after a fee, to the time of *a life or lives in being and twenty-one years and ten months thereafter*, known as the rule restraining perpetuities. This famous rule had no existence in England till after the Statute of Wills was passed, and was adopted as a salutary curb on the evil of perpetuities, in the case of executory devises. The policy of restraining perpetuities has always been a great favorite of the courts. We have a striking example of its application to the fee-simple conditional at common law, before the statute *de donis* was passed, and the most memorable example of its application which the history of the English law of real property affords, was furnished by Taltarum's case, in a large measure defeating the opposite policy of the statute *de donis*, "by a bold and unexampled stretch of the power of judicial legislation:" 4 Kent, 13. But the rule against perpetuities was first applied to executory devises by Lord Chancellor Nottingham (called the *great* Lord Chancellor Nottingham), in the *Duke of Norfolk's case*. That decision has been acquiesced in uniformly since that time, and every attempt to fetter estates by a more definite extent of limitation or a more subtle aim at a perpetuity, has been defeated: 4 Kent, 17.

This celebrated rule, in restraint of perpetuities, has never been departed from, so far as my observation goes, anywhere in England or the United States, though instances of its application have been made in thousands of cases. Amid all the mutations of the rules of construction of real property law, *that rule alone* has remained firm and unshaken. The case of *Bells vs. Gillespie* is but one of very many examples of steady adherence to it. A limitation over, if the first taker should *die without issue*, was held to be a limitation to take effect after an *indefinite* failure of such issue, and so was an estate tail; and as the first estate tail was enlarged by the act into a fee-simple, the limitation was void as *a remainder*. Neither was it a good limitation as an executory devise, because, being limited to take effect after an *indefinite* failure of issue, it offended against the rule prohibiting perpetuities. In *Bells vs. Gillespie*, Judge Carr, after stating the rule, as established by Lord Chancellor Nottingham, in the *Duke of Norfolk's case*, says: "Unless executory devises are so limited that the event on which they depend *must* happen within this period, they are void in their creation:" 5 Rand., 276. Being, therefore, void, both as *a remainder* and as an *executory devise*, it was, consequently, void altogether. As the will of John Wilson contains an exactly similar provision of *death without issue*—gene-

rally, I would pronounce the limitation over, in the will of this testator, in favor of these defendants, absolutely void. In the event of there being no change of the law since 1776, it would be entirely clear that the plaintiff here, the widow of John Wilson, is entitled to her dower. Upon that hypothesis, it would be the case of the death of a husband, intestate, seized of a fee-simple estate, and without lineal descendants or issue. In that case his heirs, under the Virginia Statute of Descents, on the failure of lineal descendants and of his father, the defendants, as the next class of heirs, would *inherit* the estates of which he died seized, but could under no possible circumstances claim under the will as *purchasers*. In that contingency, also, they would inherit the estate, in subordination to the paramount claim of John's widow as dowress, the most highly favored title known to the law.

THE ACT OF 1819, TAKING EFFECT JANUARY, 1820.

But a great change in the law has been made in Virginia since the statutes of 1776 and 1785 were passed, enlarging estates in fee-tail into fee-simple. By the act of 1819, which took effect on the 1st of January, 1820, it was enacted that every limitation in any deed or will, contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendants or other relative, shall be construed a limitation to take effect when such person shall die, not having such heir, or issue, etc., *living at the time of his death or born to him within ten months thereafter*, etc: C. V., chap. 116, § 10.

"Without issue, *living at his death!*" Why, this is no limitation contingent upon an *indefinite*, but upon a very *definite*, failure of issue. It is no estate tail resulting from an *indefinite* failure of the issue of the first taker, but on the failure of his issue, *living at his death*. It is perfectly clear, then, that the estate limited to John Wilson, in the case at bar, is no estate tail. For the same reason that under the statute of 1819, the limitation to the defendants is *not an estate tail*, and that, therefore, the statute of 1776 has no application to the case, the interpolated words which the statute requires the court to import into this devise—*living at his death*—make the limitation over to the defendants a *good executory devise*. It is not necessary to elaborate this point. The meaning and the object of the statute are too plain to admit of any doubt. It is admitted by the counsel on both sides that the following propositions are incontrovertible:

1. That as the law of England was, before the 7th October, 1776,

the words—dying without issue—imported a limitation dependant on an *indefinite* failure of the issue of John Wilson, and so, vested in him an estate tail, with a good *remainder* to these defendants.

2. That by operation of the acts of 1776 and 1785 the estate tail vested in John Wilson, being enlarged into a fee-simple, the limitation over to these defendants was void as a *remainder*, since no remainder can be limited after a fee-simple, and was void also as an executory devise for the reason that it was too remote, and offended against a well-settled rule prohibiting perpetuities.

3. That by force of the act of 1819, the limitation in favor of the defendants is a good executory devise, vesting a good fee-simple estate in them, in the event which has happened, to-wit: the death of John Wilson without issue, *living at his death or born to him within ten months thereafter*.

The only question, therefore, remaining to be considered, arising under this special verdict, is: Do the defendants take the fee-simple, *relieved* of the dower of the plaintiff or *subject* to it?

This is the great point in the case. We must discuss it as briefly as possible, since so much time and labor have been spent on the preliminary questions already discussed. I will consider it on principle and on authority—chiefly the latter.

In both curtesy and dower the legal estate for life, engrafted on the estate of inheritance will subsist, though the principal estate has ceased to exist, by death of the tenant in fee-simple or fee-tail dying without heirs, or heirs of the body. In Paine's case, 8 Co., 30, it was declared to be the common law, that if lands had been given to a woman and the heirs of her body, and she married and had issue which died, and then the wife died without issue, whereby the estate of the wife was determined, and the inheritance of the land reverted to the donor, yet the husband would be entitled to hold the estate tail for life, as tenant by the curtesy, *for that was implied by the gift*.

So of an *executory devise*, where an estate was devised to a woman in fee, with a devise over, in case she died under the age of 21, without issue, and she married, had issue which died, and then she died, under age, by which the devise over took effect; still it was held that the husband was entitled to his curtesy. This was the ruling of Lord Mansfield in *Buckworth vs. Thirkell*, 3 Bos. and Pul., 652; note. The authority of that case has been frequently questioned by counsel and elementary writers but has never been overruled. Lord Alvanley questioned the authority of that case, but it was approved by the court in *Goodenough vs. Goodenough*, cited by Preston on Abstracts of Title, vol. 3, 372.

In *Buckworth vs. Thirkell*, Lord Mansfield said: "It is said that this is a *conditional* limitation. It is *not so*, but a *contingent* limitation. All the cases cited go upon the distinction of their being *conditions* and not *limitations*. During the life of the wife, she continued seized of a fee-simple to which her issue might by possibility inherit. I am of opinion that the defendant is entitled to be tenant by the curtesy."

The rest of the court assenting, judgment for the defendant. Note to *Doe vs. Hutton*, 3 Bos. and Pul., 654.

There is a close analogy between the cases of curtesy and dower, and it would seem to be impossible to distinguish the cases, and if the husband is entitled to curtesy when the wife dies, seized of a fee-simple determinable and actually determined by the death of the wife, before attaining her age of 21, with an executory devise over, the husband is entitled to curtesy, by parity of reasoning, the widow is entitled to dower, where the husband, seized in fee, dies without heirs, with a like limitation over.

It is certainly true that there are cases in which both curtesy and dower have been denied when the principal estate was determined. The distinction referred to is that in *Buckworth vs. Thirkell*, upon the ground that, as a general rule, a derivative estate can not continue longer than the primitive estate. Chancellor Kent says, "that, as a general rule, curtesy and dower can only be commensurate with the estate of the grantee and must cease with the determination of that estate." We think this proposition is too largely stated.

The distinction between a limitation and a condition, or a conditional limitation, is nice but perfectly established. Dower and curtesy continue after the principal estate ceases, if it be attached to a *mere* limitation. This is illustrated by the cases of a fee-simple conditional at common law, of an estate tail determinable by failure of issue and an estate in fee-simple absolute determinable by failure of heirs. The derivative estate continues till the dower or curtesy expires by the death of the husband or widow respectively. The reason assigned by Lord Coke in Paine's case, cited above, is, *that this is implied by the gift*. The case of an executory devise or springing use, is equally so, and Ch. Kent admits that these three cases of the estate tail, estate in fee, both conditional and absolute, and an executory devise are established exceptions to what he calls the general rule. But it is not admitted that they are exceptions at all. They constitute a class resting on their own inherent principles of justice and right. They are not to be confounded with some other cases cited by him.

The case of an estate forfeited for condition broken stands upon a different footing. If the condition be broken by failure to pay money at a day named, it is a condition *in deed* broken, and the party injured may take advantage of it only by *entry*, and when he enters, the estate is void *ab initio*. The estate being thus destroyed, every incidental and subordinate interest growing out of it goes with it. The principal estate, in the eye of the law, *never existed*, and the maxim cited by Ch. Kent strictly applies—*cessante statu primitivo, cessant derivativis*. For a like, or, rather, the same reason, if the wife's seisin be determined by a condition *in deed*, expressly annexed to the estate, and the donor enters for the breach of the condition, the curtesy or dower is defeated, for the donor assumes his prior and paramount title, and all intermediate rights and incumbrances are thereby destroyed: 4 Kent, 33.

Now, in the three cases of the estate in fee, (simple and conditional), in tail, and the executory devise, there is *no condition*, no *breach*, and consequently no *forfeiture*; a condition broken imports a *wrong*, and a *penalty* for its violation. All the analogies of the law sustain the widow and husband, in the cases of dower and curtesy respectively, that the first estate limited is an estate *expired* by natural causes, and not determined *by wrong*. They are all cases of *mere limitation*, and a limitation merely shifts the estate from one person to another, leaving the prior seisin undisturbed. The limitation over takes effect, and the estate next in expectancy vests without entry, and the curtesy or dower is, respectively, preserved. "If the estate in fee of the wife, determines by executory devise, or springing use, it seems that the title of curtesy will continue, notwithstanding the determination of the wife's estate. As a reason for the exception in these cases of curtesy and dower, it has been suggested that *these limitations, by executory devise, and springing use, are not governed by common law principles*; and when the limitation over was allowed to be valid against the former donee, it was *on the terms that the limitation over should not impeach the title of dower and curtesy*:" I Lomax's Dig., 84 § 18; citing many authorities.

Yes, dower and curtesy were old titles which had existed immemorially at common law, but the executory devise and the springing use were modern inventions, the first owing its origin to the Statute of Wills, and the second to the Statute of Uses, five years before. In all these cases they shift without disturbing the seisin of the original estate, and the party taking the ulterior estate takes it *cum onere*, that is, subject to the incidental interest of dower or curtesy engrafted upon it by the mere operation of law.

Buckworth vs. Thirkell was the case of a determinable fee-simple devised to trustees and their heirs, to receive the rents and profits of the estate, and apply them to the maintenance of Mary Barnes till she arrive at the age of 21 years, or till she married, and at her arriving at full age or marrying, to the use of Mary Barnes, her heirs and assigns; but in case said Mary should die before the age of 21 years, and without leaving issue, remainder over. Mary married and had a child, which child died, and then Mary died, before she arrived at the age of 21 years.

The question was, whether Mary's husband was entitled to be tenant by the curtesy?

The case was twice argued by learned counsel. On the first argument, Lord Mansfield, C. J., said, There is no case expressly in point, let it be spoken to again.

Buller, J. Is the remainderman here heir at law? It was admitted at the bar that he was, and it was agreed to add that fact to the case.

On the second argument, the fact that the remainderman was heir at law was admitted as part of the record. We have already seen that the right of the husband to his curtesy was unanimously affirmed.

The full note of *Buckworth vs. Thirkell* was appended by Lens. Sergeant, to the case of *Doe vs. Hutton*, 3 Bos. and Pul. 652-'4. In delivering his opinion in the former case, Lord Alvanley, C. J., expressed doubt of the correctness of the ruling of Lord Mansfield, in *Buckworth vs. Thirkell*, and said it made a noise in Westminster Hall at the time, but distinguished it from the case at bar. He cited the notes of Hargrave and Buller's Co. Litt., fol. 241, a, and said he fully concurred in the reasoning, that it was worthy of attention, but said the whole Court were of opinion that the case then at bar, was clearly distinguishable from *Buckworth vs. Thirkell*, and declined to enter upon the question respecting curtesy and dower, or to give any opinion on the ruling of Lord Mansfield in that case. *Buckworth vs. Thirkell*, therefore, was not overruled by the case of *Doe vs. Hutton*, and so far as Lord Alvanley committed himself adversely to the ruling of Lord Mansfield in *Buckworth vs. Thirkell*, his opinion was *obiter*.

The case of *Moody and wife vs. King*, 2 Bingham, 447 and 9 E. C. L. Rep., 624, was the identical case now at the bar. It was a devise in fee to the husband, with a limitation over to the heirs at law, if the husband died without issue living at his death, being a good executory devise over, in the contingency which had happened, viz: the

death of the devisee in fee, without issue surviving him. The widow of the devisee and her second husband filed their bill in equity for assignment of dower, reciting all the facts. The executory devisee in fee demurred to the bill. On the 12th of June, 1824, the demurrer was heard before the Vice-Chancellor, when he directed the above case to be stated for the opinion of the Court of Common Pleas on the question: Whether the widow was entitled to dower of the estate of which her first husband died seized in fee?

The case was fully argued by Wilde, Sergt., for the widow, and Cross, Sergt., *contra*.

Wilde cited *Buckworth vs. Thirkell*, 3 Bos. and Pul., 652, note, and the authorities there cited, as decisive of the question, and not distinguishable from the case of dower here presented. *Buckworth vs. Thirkell*, he said, had been confirmed by the decision of *Goodenough vs. Goodenough*, as referred to in Mr. Preston's work on Abstracts, vol. 3, 372.

Cross cited Buller's note on the subject, at 241, Co. Lit., approved by Lord Alvanley, in *Doe vs. Hutton*, 3 Bos. and Pul., 652. He said the husband took the land, subject to a *condition* which was to determine the fee, and that the fee having determined, pursuant to the condition, there was no longer any estate on which the claim of dower could attach.

The opinion was delivered by Best, C. J., in which *Buckworth vs. Thirkell* was reviewed and approved, and the *dictum* of Lord Alvanley, approving Buller's note to 241, Co. Lit., overruled. The Chief Justice said: "The great respect I feel for Lord Alvanley and the bar, is such as to make me pause before I make up my mind as to the certificate that should be sent to the Vice-Chancellor. I must be permitted, however, to say that after a decision of the Court of King's Bench, which was much considered before it was pronounced, has remained unimpeached for more than forty years, and has been confirmed by *Goodenough vs. Goodenough*, we ought not to overturn it unless it establishes a rule productive of injustice and inconvenience. Whatever conveyancers might have thought of the case when it was first decided, they have considered it as settling the law, and it would be productive of much confusion to unsettle it again. * * If there is any right which ought to be favored in a court of justice, it is the widow's right to an independant maintenance; but this right is attempted to be got rid of by a technical argument, by a mere quibble on words. It is admitted that when an estate in fee is given to a man *if* he has children, his wife will be entitled to dower, al-

though he has no child; but it is insisted that if an estate in fee be given him, *without* any such condition, and it is afterwards added that, if he has no children at the time of his death, then the estate shall go to A. B., his wife is not dowable. This distinction is unworthy of a science which is to settle equitably the rights of the subjects of this country."

The Judges, consisting of Best, C. J., afterwards Lord —, and Park, Burrough and Gazele, J., certified their unanimous opinion that the *widow was entitled to her dower*.

These two decisions, of *Buckworth vs. Thirkell*, establishing the right of curtesy, and of *Moody vs. King*, establishing the right of dower in a fee-simple estate, determined by the death of the wife and of the husband, respectively, without leaving issue surviving the devisee in fee, are strong *persuasive* authority in support of the claim of the widow of John Wilson against the executory devisees, the defendants in this action. They have not the force of *conclusive* authority in Virginia, since they were both rendered since the American Revolution; but they are enforced with great power of logic, and, certainly, have not been refuted by the subtle technicalities of Buller, Roper, Preston or Kent. The last named distinguished commentator has rather intimated than expressed an opinion adverse to the ruling of Lord Mansfield in *Buckworth vs. Thirkell*, and says that neither Buller, Roper, or Lord Alvanley, have traced the lines of the distinction between a *conditional* and a *contingent* limitation with satisfactory clearness and precision, or shown any sound principle on which it rests: 4 Kent's Com., 34, note (a). Chan. Kent seems to have entirely overlooked the case of *Moody vs. King*, in which Best, C. J., has pronounced the distinction between a conditional and a contingent limitation as sound, and that the attempt to defeat dower on the ground that the fee-simple of the husband was determined by the *breach of a condition* which defeated the principal estate *ab initio*, (and of course, the dower with it), turned upon a mere quibble on words, and as "unworthy of a science which is to settle equitably the rights of the subjects of this country."

I shall, in conclusion, cite but a single other authority, but that is a *conclusive*, and not merely *persuasive* authority. It is the case of *Taliaferro vs. Burwell*, 4 Call., 321. It is a Virginia case, decided by the Court of Appeals, in 1803. Not a single authority is cited by the Chancellor below, and the Court of Appeals unanimously affirmed it, without a word of comment. It is the case of a claim to curtesy, and is the exact counterpart of *Buckworth vs. Thirkell*, but

though *Buckworth vs. Thirkell* preceded *Taliaferro vs. Burwell* several years, the former is not cited in the report of the latter case. It was briefly this:

The testator devised a real estate in 1777, to his two infant daughters, in fee-simple, his whole estate, real and personal, and directed that the whole should be equally divided between them, share and share alike, but that "if my two daughters should die before they are of age, and without issue of their bodies," then over to the children of a sister of the testator. One of the daughters died at an early age and the other was married, and issue born alive, but died immediately, and then the mother died at the age of 19, leaving her husband surviving her. The husband claimed his curtesy, and the Chancellor decreed it to him.

The devises to the two infant daughters were cross remainders, and on the death of the first the whole was held in fee-simple by the surviving daughter, but subject to the executory devise over. But as she died under age and without leaving issue, the estate in fee vested in the executory devisees. The only question was whether the husband was entitled to hold the whole estate for his life as tenant by the curtesy? or did it expire when the wife's estate in fee determined?

This was the case of *Buckworth vs. Thirkell* over again, and decided the same way.

The report of the argument of counsel is very meagre, but the points relied on, on either side, are intelligibly stated.

Warden for the appellants (or executory devisees,) insisted that the appellee (husband) could not claim curtesy of a defeasible estate, for the happening of the event puts an end to it, and the limitation taking effect as an original devise, destroys all mesne rights.

Wickham, in reply, said an estate in fee was given unconditionally to the two daughters, and on the death of one, the survivor took the whole fee. On the birth of his child, the husband had a right to curtesy, though the wife's subsequent death during her minority defeated the estate; *for the rights of dower and curtesy continue after the expiration of such determinable interests.*

Wickham here cites 2 Bal. Ab., 223; Co. Litt., 241 (a). It is worthy of remark that the distinguished John Wickham, one of the ablest and most profound lawyers of his or any day, cites Co. Litt., Folio 241 (a), which is the identical authority cited by Lord Mansfield in *Buckworth vs. Thirkell*, and the appended note (a) is the note of Butler, denying the authority of that case. Butler's

note was approved by Lord Alvanley, in his *obiter* opinion cited above and utterly dissented from by the Court of Common Pleas in *Moody vs. King*, *supra*. The Virginia case of *Taliaferro vs. Burwell*, is directly in point, and a conclusive authority in favor of the right of dower after the determination of a preceding estate in fee, succeeded by an executory devise in fee.

On the fullest consideration, I am of opinion, both on principle and on authority, that the plaintiff here is entitled to recover her dower, and judgment is accordingly rendered in her favor.

J. W. BROCKENBROUGH.

Lexington, Va.

MECHANIC'S LIEN.

From the statutes of nearly all the States, we learn that mechanics who have furnished either labor or materials for the erection, originally, of improvements, or the repair of such as have been erected, have a lien upon the improvements, and upon the realty covered by the improvements, for the satisfaction of the charges created in erecting the same. Also, that persons, not technically mechanics, who have furnished materials therefor, have a like lien. The exact character of these liens, the extent and remedy to enforce the same, shall be the subject of this article.

This lien finds its origin in the universal sense of right and justice, and is based upon the idea that one man shall not have either the *labor* or *property* of another without paying for the same, and is merely a statutory expression of this idea in behalf of mechanics and material men. This same principle has, all along the progress of the law, been cropping out in behalf of one interest and another. It appeared from a very early day in behalf of bailees, to whom chattels had been entrusted for repair; to warehousemen, and factors of various kinds. So, upon like principles, if one purchase an estate with the money of another, the law gives the latter a lien to the extent of the money invested. So, if the labor and skill, money or materials, of one person has been used to augment the estate of another, by erecting improvements upon it, for a like reason the latter should have a lien.

As simple as this right appears in morals, it is not free of difficulties when it comes to be legally applied and enforced.

The right is based exclusively upon the statutory enactments of the different States, and while these statutes may and do differ in the details of each, in many respects, yet there is sufficient harmony between them to render the decisions made under one not wholly inapplicable to another. These statutes and decisions now constitute a prominent feature in the jurisprudence of America, and are so fully and completely incorporated, that no one thinks of repealing the statutes, and each court aims to reduce the statute to method and precision. Whatever of complaint that now finds utterance against them, is directed more to the manner of enforcing them than to orig-

inal justice and propriety. Without attempting to find an analogy to this lien in the law, or point out any general difference between this and other liens, we will pass at once to the statutes and decisions, and leave it to another more curious to trace its analogies and differences.

This lien may be created, and become a charge upon the improvements, and upon the land, without any writing, and purely upon a parol contract. It usually arises upon work being done, or materials furnished, without any very definite contract, and relates back to a point of time at which the work was commenced. Having once arisen, it continues by law for a certain time, and may be extended for a further time by judicial process. The proceeding, while it does not destroy the remedies which usually obtain between creditor and debtor, is nearly in *rem* so far as it seeks to enforce the lien.

The *lien* is anterior to the process, and arises out of a certain state of facts, and the process is not used to raise the lien originally. The lien arises upon a contract, and work done or materials furnished thereunder. This contract need not be expressed, but may be implied. If there be no contract, either express or implied, then no lien arises, although the value of the estate has been increased by reason of the improvements. This principle obtains for most obvious reasons, otherwise the owner of an estate could be *improved* out of it, against his will, and without desiring to have any improvements put upon it.

Ordinarily, the persons to whom this lien relates, and who are affected by it, are the following: 1st. The owner of the land. 2nd. The contractor who undertakes to do the work. 3rd. The sub-contractor and journeyman. 4th. The material man.

As the lien only attaches to the interest in the land of the person having the work done, it becomes of the first importance to the other parties to know *what interest* he possesses. There is no exception to this rule in favor of mechanics; they, like other persons, must ascertain the nature and extent of the interest of their employers. Third persons, with vested rights, are not to be affected, except they consent thereto, or are estopped, by an implied assent, as in cases of fraud, &c. Under mechanics lien acts, every person is an owner of the estate who has any legal or equitable interest therein, and the lien is co-extensive and commensurate with this interest. If the employer owns the *fee*, the lien attaches to the *fee*; but if he owns a less estate, such as for life, or for years, then the lien attaches to just that interest, and no more: *Choteau vs. Thompson*, 2 Ohio State, 114.

If the employer owns a conditional estate, the lien goes hand in hand with the condition. If the employer loses the estate by his failure to perform the conditions, the lien goes with it: 8 Smed. & Marsh, (Miss.) 754; *Id.*, 444; 1 Watts & Serg., (Penn.) 218; 12 Iowa, 125; 13 California, 54; 11 Georgia, 46; 11 Indiana, 3. The lien stands or falls with the estate of the employer: 12 Casey, 247, whether it be a legal or an equitable estate.

As the lien arises upon contract, express or implied, the question, whether the lien could be acquired upon the land of a married woman, or an infant, would depend in a great degree upon the capacity of these parties to make a contract affecting their realty, in the particular State. Where the common law has not been changed by some statutory provision, the lien would never arise against either a *feme covert* or an infant. The following cases will illustrate and present the question as regards married women: *Hauptman vs. Catlen*, 1 E. D. Smith, (N. J.) 736.

A contractor is the person who stipulates with the owners to erect the improvement. If he sub-lets the entire job and it is completed by his sub-contractors, while the contractor has a lien as against the owner, the contractor's lien is subject to the lien of his sub-contractors, and if the property, when sold, is insufficient to pay all the liens, the contractor who has sub-let the whole, can not demand a *pro rata* part, but will be postponed: 9 Barr., 449. It seems, however, the foregoing general statement might be qualified if the statute gave the lien alone to the contractor: 30 Ver., 768.

In cases in which the contractor has failed to comply with his agreement, but has done the work not in the manner specified by the contract, it has been held that he has no lien.

In some of the cases the contractor failed to show that he had done the work in the manner agreed upon, and therefore resorted to a general account, and proposed to recover to the extent that the work and materials benefited the defendant, and it was held that he could not recover: *Ellis vs. Hamlin*, 3 Taunton, 52, 17 N. Y., 187.

But it will be seen upon an examination of adjudicated cases, that the English and New York decisions are at variance on this point, with those of many of the States of the Union. This, however, goes more to the right to recover anything, than to the question of lien. It is presumed, however, that in those States in which the mechanic is allowed to recover upon a *quantum meruit*, that the lien will be co-extensive with the recovery; not so, however, upon the other hand, in case the owner breaches his contract, and is sued in dam-

ages, for the breach, would the mechanic have a lien for his damages, in case the recovery was purely for damages.

A question sometimes arises as to the priority of the liens of the different classes of mechanics, who contribute each in a certain order of time, to the erection of improvements. This, ordinarily the first work done, is preparing for and laying the foundation. This is usually completed before the carpenter, if the house be built of wood, or the mason, if the house be of brick, does anything towards its completion—and in regular order of time, the one class of workmen follow the other, until the last is completed, and the question sometimes arises between these different mechanics, who has priority of payment, whether he who was first in time, is first in right. The equitable rule of dividing the proceeds *pro rata*, seems to be the general rule; not, however, without some exceptions, and these exceptions are based upon the particular statute, and the particular contract. Generally, all the liens relate back to the same point of time. If, however, separate contracts have been made with the different classes of mechanics or material men, and one class has completed his or their part, and had proceeded judicially, or according to any requirement of the statute, to fix his or their liens, it would not be claimed that such a fixed lien could be displaced by work subsequently done, or materials subsequently furnished: 2 Handy (Ohio) 277; 1. E. D. Smith, (N. Y.) 675; see also 18 California, 371. It is not believed, however, that the courts would destroy the equitable rule of paying each *pro rata*, except in a case presenting clear and strong equities.

Material men are not necessarily mechanics, and yet have a lien for the materials furnished. If there is no statute securing the lien to these, then they must look to the person to whom they sell their materials.

Under most of the statutes the material man has a lien, whether he furnishes materials to the owner or the contractor, and in some of the States, it has been held, that the lien exists whether the materials furnished were used or not on the building: 10 Penn. State, 413; 4 Maryland, 297; 42 Maine, 77; 30 Connecticut, 468; holding that it would be unjust to throw upon him the onus of proving the amount of the material applied.

Whether the material delivered by the material man is to be regarded as delivered upon the credit of the owner or of the contractor, has sometimes been a vexed question, and not without serious consequences. After the delivery at the designated place has been made,

could the material be levied upon, and if so, as whose property—that of the contractor or the owner. If the material man has a lien upon the house and land of the owner for the materials so delivered, certainly the owner should be protected against it being sold as the property of the contractor; and if it should be levied upon as the property of the owner, then we have the instance of a house and land being subject to a lien for materials, which never went into the erection of the house.

These controverted points came before the courts of Pennsylvania in a case reported in 18 Penn., 54.

Again, suppose the case of materials delivered, but never used, or if used, in another and different house.

The proper rule, it seems to us, and one certainly more consonant to reason, and presenting less complication and difficulty, would be to hold, that the lien in behalf of the material man never attaches to the improvements or premises, until the materials have been used, and become attached to the freehold, the original reason and claim for the lien being based upon the idea that where one person's labor and materials have been used to improve the estate of another, the lien should arise, to that extent, in behalf of the person whose labor or materials have been so used. In those States, in which the material man has a lien for all materials furnished upon the order of the contractor, the owner is greatly exposed to serious damage by their having his credit and his premises standing at the discretion of another.

As regards the material man, it does seem that the safer rule would be to give him a lien for all the materials used, and require him to notify the owner of the amount of his claim before the latter pays the contractor.

And while the mere day laborer and subordinate presents equal merits to the contractor or material man, it would be dangerous to extend the lien to these without some qualification. Therefore, in most of the States, while all the benefits of the statutes have been extended to this class, it has generally been so conditioned as to avoid the obvious dangers, and these have been required to give written notice to the owner to the effect that the lien would be looked to as security; and this notice was required to be given at the time the claimant commenced to work, or, at all events, before the owner had settled with the contractor. No statute, however, can be framed to cover the claims of this character of persons that will not in many instances work great hardships. If a contractor should agree with

the owner to take the notes of another or to receive land in satisfaction of his claim, and the contractor should then fail to pay his subordinates, the lien of the latter might seriously affect the original contract and change its entire consideration; so if the owner should pay the consideration in whole or in part, in advance, or if the contractor should abscond, leaving more due his subordinates than was due him from the owner.

To what area of land, exclusive of that upon which the improvement stands the lien includes, depends entirely upon the particular statute. As a general rule, the statutes either extend it to the whole farm, or sufficient to satisfy the demand, or to so much as is necessary to the enjoyment of the buildings.

In some of the States, the exact amount by acres or feet are mentioned. This, however, is not without its difficulties. It does seem that the better rule would be, to extend the lien to so much of the land as is necessary to satisfy the demand.

Another question has sometimes presented itself in this connection, of this character, viz: pending the lien, the improvements or erections are destroyed by fire.

If the contractor has a lien only upon the buildings, the loss must be borne by him, if without the enforcement of the lien he can not satisfy his demand.

If the lien extends to the land as well as the buildings, and the latter are destroyed, can he enforce his lien upon the land alone?

In the case of *Gaty vs. Casey*, 15 Illinois, 132, the court answers the foregoing question in the affirmative.

The courts of Pennsylvania, however, hold otherwise deciding that the lien originates on the building, and depends upon it alone, and without it can not be enforced (27 Penn., 247), remarking in the argument that the contractor and all others, who have liens by the statute, have insurable interests, and by the use of this right could protect themselves, against loss in this direction.

The decisions upon this point, however, are so few that it may be set down as still an open question.

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Attachments, Void and Voidable,

Upon the question as to what irregularities in an attachment proceeding under the laws of Tennessee, will render a judgment or decree rendered in such proceeding void, and what will render the same voidable merely, the decisions of the Supreme Court of the United States are in conflict with those of the Supreme Court of Tennessee.

In the first place, the Supreme Court of Tennessee has repeatedly held, both before and since the adoption of our code, that an attachment, under our statutes, is not a proceeding in *rem*, but a proceeding in *personam*: See *Green vs. Shaver*, 3 Hum., 141; *Perkins' Heirs vs. Novell*, 6 Hum., 153; *Snell & McGavock vs. Allen*, 1 Swan, 211; *Bogges vs. Gamble*, 3 Cold., 154; *Rogers vs. Rush*, 4 Cold., 272; *Ingle vs. McCurry*, 1 Heis., 26; *Riley vs. Nichols*, 1 Heis., 16.

The inevitable consequence of this holding is, that if the steps which are prescribed by our statutes to bring the defendant before the Court, are not taken, the judgment or decree, and a sale of property thereunder, are absolutely void.

But the Supreme Court of the United States, in the case of *Cooper vs. Reynolds*, 10 Wal., 308, held that an attachment proceeding under the Code of Tennessee, in case there is no appearance by the defendant, and no service of process on him, becomes in its essential nature, a proceeding in *rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find due the plaintiff, and consequently that the want of the necessary steps to bring the defendant before the court, will not render the judgment or decree, and a sale of property thereunder, void.

The Court bases its decision upon this point, on these two propositions, which it assumes to be *well established*:

1. That the suit can not be proceeded with without a levy of the attachment on the property of the defendant.
2. That the judgment against the defendant can have no effect beyond the property attached in the suit.

As regards the first of these propositions, the *proposition is true*, but the *conclusion is false*, for § 3424, of the Code expressly provides that "the attachment" (i. e. the attachment of the defendant's property by the levy of the writ upon it), "and publication are in lieu of personal service of process on the defendant."

As regards the second proposition, *the proposition itself is false*, for § 3558 of the Code expressly provides that "when the property attached is not sufficient to satisfy the recovery, execution may issue for the residue as in other cases."

The learned Judge who delivered the opinion of the Court in the case of *Cooper vs. Reynolds*, seems to have read none of the provisions of the Code on the subject, except the few sections cited in the briefs of counsel. The opinion exhibits such a remarkable want of information upon the subject of our attachment laws, as to entirely neutralize the effect of the case as authority, notwithstanding the dignity of the tribunal by which it was decided.

The case of *Voorhees vs. Bank of the United States*, 10 Peters, 449, cited in the case of *Cooper vs. Reynolds*, as an authority for the decision therein made, was a proceeding in *rem* under a statute of Ohio, and not a proceeding in *personam*.

But as regards an attachment proceeding under the statutes of Tennessee, the principle that it is not a proceeding in *rem*, but a proceeding in *personam*, having been well settled by our Supreme Court previously to the adoption of the Code, the principle that had been thus settled, was, as we have seen, incorporated into the Code, §§ 3424, 3558, by express enactment.

The provision of § 3353, that the death of a defendant either before or after the commencement of the proceeding, does not render the proceeding void, might seem to be in conflict with §§ 3424, 3558, were it not for the fact that a similar provision is made in regard to the case of a defendant proceeded against by *publication alone*, in lieu of personal service of process: Code, § 4380.

Another question upon which the decisions of the Supreme Court of the United States, and those of the Supreme Court of Tennessee are in conflict, is that in regard to the object and effect of an ancillary attachment under the laws of Tennessee.

An ancillary attachment was first given by the Act of 1843, ch. 29, and can only be resorted to when the action is brought in the ordinary mode.

According to the decisions of the Supreme Court of Tennessee, its sole object is to secure the defendant's property, so as to have it

forthcoming to satisfy the judgment which may be rendered; and does not, (unless proceedings which were pending when the Constitution of 1865, was adopted, form an exception), bring the party into court.

According to these decisions, the ancillary attachment is not a new suit, as an auxilliary attachment sued out in a Court of Chancery, in aid of a suit at law is, but is a part of the suit in which it is sued out, and, therefore, the summons—the original process—must be served on the defendant, otherwise the Court acquires no jurisdiction of his person, and consequently a judgment or decree against him without such service is absolutely void: See *Fisher & Co. vs. Cummings*, 7 Hum., 233; *Boyd vs. Buckingham & Co.*, 10 Hum., 438; *Thompson vs. Carper*, 11 Hum., 544, 545; *Barber vs. Denning*, 4 Sneed, 269, 270; *Swann vs. Roberts*, 2 Cold., 157, 158; *Bogges vs. Gamble*, 3 Cold., 151; *Ingle vs. McCurry*, 1 Heis., 28; *Gibson vs. Carroll*, 1 Heis., 25.

But the Supreme Court of the United States, in the case of *Cooper vs. Reynolds*, 10 Wal., 318, held that the defendant had been brought before the court by publication made in a proceeding by ancillary attachment. The court did not seem to understand the attachment laws of Tennessee sufficiently to know that we *have* different kinds of attachments, much less to understand which kind was then before the court.

The law that an ancillary attachment does not bring the defendant into court, is so well settled by the decisions of the Supreme Court of Tennessee, that it is not deemed expedient to enter into a discussion as to whether or not the decisions upon that point are correct in principle.

Since an attachment under the laws of Tennessee is a proceeding in *personam*, the question naturally arises, what steps are necessary to bring the defendant before the court so as to give the court jurisdiction of his person?

In the case of an ancillary attachment, we have just seen that the original summons in the suit in which the attachment is sued out, must be served on the defendant, that being the mode in which he is brought before the court.

As regards original and judicial attachments, they are used for the double purpose of bringing the defendant into court, and of securing his property to answer such judgment as may be rendered against him.

We have seen that where an attachment is used for the purpose of

bringing the defendant into court, "the attachment and publication are in lieu of personal service upon the defendant:" Code, § 3524.

It will, therefore, be seen that two things are necessary to bring the defendant before the court:

1st. The attachment of his property; which is done by the issuance and levy of a writ of attachment upon it.

2nd. Publication in the manner prescribed by the statute.

Section 3522 of the Code specifies what the memorandum or notice required to be published shall contain, and our Supreme Court has very properly held that the notice must comply with these requirements; otherwise it will not, with the levy, bring the defendant into court: *Rogers vs. Rush*, 4 Cold., 272; *Riley vs. Nichols*, 1 Heis., 16; *Ingle vs. McCurry*, 1 Heis., 26.

This holding is certainly correct; for, if any one of the requirements of the statute, in regard to what shall be contained in the notice required to bring the defendant into court may be disregarded, they all may be disregarded.

The section of the Code specifying what the notice shall contain, is as follows:

"This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit:" § 3522.

In the decisions above referred to as holding that the notice must comply with these express requirements of the statute, the line of argument is the same where the judgment or decree is brought directly in question by a proceeding for the correction of errors, as it is where the judgment or decree is collaterally attacked.

This is *very proper*; for, it is clear that if the notices which were published were not sufficient to bring the respective defendants into court, the respective judgments or decrees and proceedings thereunder were absolutely void; and, on the other hand, that if said notices were sufficient to accomplish the only object for which they were designed—that of bringing the defendants into court—the proceedings were *not even voidable* on account of any defect in said notices.

In other words, irregularities in the notice, being irregularities in the proceeding required to give the court *jurisdiction* of the person of the defendant, and the proceeding being a proceeding in *personam*, the irregularities necessarily either rendered the judgments or de-

crees absolutely void, or else did not affect their validity at all. The question being one of *jurisdiction*, the learning as to distinctions between void judgments and those which are merely voidable, has no application.

It may be proper to remark that the provisions of the Code in regard to publication are different from those of previous statutes on that subject; and that the case in 4 Cold. is the first case in which the effect of those provisions was considered by the Supreme Court.

The Act of 1794, ch. 1, did not require publication at all. It, however, provided that where it could be done conveniently, notice should issue from the court to the defendant.

The Act of 1836, ch. 43, authorizing original attachment proceedings in Courts of Chancery in certain cases, required publication to be made in some newspaper designated by the court, stating the names of the parties and briefly setting forth the substance of the bill.

The Act of 1842, ch. 54, § 2, authorizes the order of publication to be made by the Clerk and Master.

The Act of 1846, ch. 108, § 2, required the *plaintiff* in an attachment against a *non-resident*, before a Justice of the Peace, to "give public notice, by advertisement, of the time and place fixed for the trial of the suit, requiring the defendant then and there to appear and defend the cause."

Such were the provisions of our attachment laws, upon the subject of publication, previously to the adoption of the Code.

The Code, as we have seen, requires, in addition to the levy of the attachment, publication in all cases, in lieu of personal service, and prescribes uniform requirements as to what the published notice shall contain.

In the case of *Dean vs. Nelson*, 10 Wal., 172, the Supreme Court of the United States held, that where the defendants to a proceeding within the Federal lines, during the late civil war, were, at the time of the proceeding, within the Confederate lines, "a notice directed to them and published in a newspaper, was a mere idle form. They could not lawfully see nor obey it. As to them, the proceedings were wholly void and inoperative."

The proceeding in which the notice was thus declared to be void and inoperative, was not an attachment proceeding, but the *principle* is precisely the same as if it had been; and is a principle which commends itself as sound and just.

It is to be regretted that the same august tribunal in a subsequent

case denied the benefit of this just principle to a defendant, upon the ground that it was his own fault that he was not within the Federal lines: See *Ludlow vs. Ramsey*, 11 Wal., 588, 590.

This indirect mode of *inflicting punishment* upon parties for taking the wrong side in our late unhappy civil strife, certainly has nothing in it to commend it.

Having discussed at some length the steps necessary to give the court jurisdiction of the person of the defendant, it seems that some allusion should be made to what is necessary to give the court jurisdiction of the subject matter; for want of jurisdiction of the subject matter of the suit, will, no less than the want of jurisdiction of the person, render the proceedings absolutely void. "In order to obtain an attachment, the plaintiff, his agent or attorney, shall make oath in writing, stating the nature and amount of the debt or demand, and that it is a just claim; and also, that one or more of the causes enumerated in section 3455 exists:" Code, § 3469.

If the demand stated in the affidavit is such as is not within the jurisdiction of the court in which the suit is brought, or if it should distinctly appear elsewhere upon the face of the record that the subject matter is not within the jurisdiction of the court, the proceeding would, of course, be void.

It has also been held, that in order to give the court *jurisdiction* to proceed by attachment, the affidavit must be in substantial conformity to the requirements of the section of the Code above cited: See *Sullivan vs. Fugate*, 1 Heis., 22, 23; *Ogg vs. Leinart et al*, *Id.*, 40, 42.

Mere *formal* defects in the affidavit will not affect the validity of the proceeding: See Code, § 3477.

Where the affidavit did not state that the claim was *just*, but stated the amount of the debt, and that it was on the defendant's note or bond, a copy of which was appended, showing that it was made under the defendant's seal, and contained a promise to pay a certain sum to the complainant's order, for value received, the Supreme Court of the United States *held*, that these statements in the affidavit *more* than compensated for the omission to state that it was a just claim: *Ludlow vs. Ramsey*, 11 Wal., 587, 588.

This decision may be correct; but if all promises under seal are just claims, the writer has seen a good many errors committed upon this point by the courts; for he has seen a good many such claims successfully, and as he had supposed justly, defended.

In Courts of Chancery, in all cases where creditors are allowed to

come in and prove their claims against their debtor's estate, before the Master, under a decree, an affidavit that the claim remains justly due is required: Danl. Ch. Pr., 1407.

The object in requiring the affidavit is to guard against fictitious claims which the parties presenting the same do not themselves believe to be founded in justice, although they may be able to produce documentary or other evidence in support of their claims sufficient to show a *prima facie* case of indebtedness: *Morris vs. Mowatt*, 4 Paige, 145.

The object in requiring a party who sues out an attachment to swear to the justice of his claim is precisely the same as that in requiring a creditor coming in to establish his claim before the Master. In neither case can the affidavit be used as *evidence* to establish the claim, but is intended to guard against fictitious or unjust claims which the party may be able to support by evidence sufficient to show a *prima facie* case of indebtedness.

The object being the same, the same rule ought to be applied in the one case as in the other.

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PROTEST OF BILLS AND NOTES.

SECTION I. *Nature and Necessity of Protest.*

SECTION II. *By Whom and Where Protest Should be Made.*

SECTION III. *Formal Making, Preparation, and Authentication of Protest.*

SECTION IV. *Contents of Protest.* SECTION V. *The Protest as Evidence.*

SECTION I.

NATURE AND NECESSITY OF PROTEST.

What Instruments Must, or May be, Protested.

§ 1. When a foreign bill of exchange is presented for acceptance or payment, and acceptance or payment is refused, the holder must take what is called a Protest in order to charge the drawer, or any indorser. According to the law of most foreign nations,¹ a protest is essential in the case of the dishonor of any bill; but by the custom of merchants in England,² and wherever the law merchant prevails in the United States, the protest is only necessary in the case of foreign bills;³ though by Statute in most of the States inland bills and promissory notes *may* be protested in like manner.⁴ So indispensable

¹ Thompson on Bills, 307.

² *Orr vs. Maginnis*, 7 East, 359; *Gale vs. Walsh*, 5 T. R., 239; *Borough vs. Perkins*, 1 Salk, 131; *Chitty on Bills*, (13 Am. ed.) 372; *Byles*, (Sharswood's ed.) 394.

³ *Burke vs. M'Kay*, 2 Howard, 66; *Young vs. Bryan*, 6 Wheat., 146; *Union Bank vs. Hyde*, 6 Wheat, 372; *Bailey vs. Dozier*, 6 Howard, 23; *Bank U. S. vs. Leather's*, 10 B. Monroe, 64; *Hubbard vs. Troy*, 2 Iredell, 134; *McMarchey vs. Robinson*, 10 Ohio St., 496.

⁴ The Virginia Code, chapter —, provides:

“§ 7. Every promissory note, or check for money, payable in this State at a particular bank, or at a particular office thereof, for discount and deposit, or at the place of business of a savings institution, or savings bank, or at the place of business of a licensed broker, and every inland bill of exchange, *payable in this State*, shall be deemed negotiable, and may, upon being dishonored for non-acceptance or non-payment, be protested, and the protest be in such case evidence of dishonor, in like manner as in the case of a foreign bill of exchange.

“§ 8. The protest, both in the case of a foreign bill and in the other cases mentioned in the preceding section, shall be *prima facie* evidence of what is stated therein, or at the foot, or on the back thereof, in relation to presentment, dishonor, and notice thereof.”

is the protest of a foreign bill in case of its dishonor, that no other evidence will supply the place of it, and no part of the facts requisite to the protest can be proved by extraneous testimony,¹ and it has been said that it is a part of the constitution of a foreign bill.² But, while the practice is usually followed to protest inland bills and notes, under the permissive statutes, it is not a practice which makes it incumbent to protest them; and the holder may waive the privilege if he choose to do so, and produce other evidence of dishonor.³

§ 2. The requisition of a protest in the case of foreign bills was in order to afford authentic and satisfactory evidence of due dishonor to the drawer, who, from his residence abroad, would experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representations of the holder. "It also," observes a distinguished author, "furnishes an indorsee with the best evidence to charge an antecedent party abroad; for foreign courts give credit to the acts of a public functionary in the same manner as a protest under the seal of a foreign notary is evidence in our courts of the dishonor of a bill payable abroad."⁴ Such was the convenience of evidence in this form, obviating the necessity of the attendance of witnesses, and preserving their testimony where otherwise it might be lost by death or removal, that it became common to protest inland bills, and promissory notes as well; and the holder was often disappointed in finding that such protest was not evidence of dishonor.⁵ This led to a very general enactment of statutes authorizing protests in such cases; and giving them the like effect as in cases of foreign bills.

The law merchant requires a protest and notice only in cases of bills *negotiable* by the custom of merchants. Bills payable "in currency," or any other medium than legal money, are not of this character, and therefore no protest is necessary, nor is it, unless by statute, evidence of any fact therein stated.⁶

Foreign Promissory Notes.

§ 3. In the case of promissory notes executed in one State or country and payable in another, no notice, of course, is necessary to charge the maker; and if there be no indorser there can be no analogy

¹ *Union Bank v. Hyde*, 6 Wheat, 372; *Carter v. Union Bank*, 7 Humph., 548.

² *Borough v. Perkins*, 1 Salk., 121, 2 Lord Raymond, 992; *Chitty on Bills*, (13 Am. ed.) 373 top p, and 333xp.

³ *Bailey v. Dozier*, 6 Howard, 23; *Wanger v. Tupper*, 8 Howard, 234; 2 Rob. Prac., (N. ed.) 121.

⁴ *Byles on Bills* (Sharswood's ed.) p. 395.

⁵ 2 Rob. Prac., (N. ed.) 181.

⁶ *Bank of Mobile v. Brown*, 42 Ala., 108; *Ford v. Mitchell*, 15 Wisc., 304.

between the note and a bill. But as soon as a promissory note is indorsed it becomes closely assimilated to a bill, the maker being primarily liable like the acceptor, and the indorser secondarily like the drawer. It is often said that every indorser is a new drawer, and in fact the indorser's obligation is precisely like that of the drawer on an accepted bill. Therefore when an indorsed note is payable in a State or country different from the one where it is drawn,—perhaps more especially when the indorser is not of the State or country where it is payable, tho' no distinguishing difference, it seems to us, exists,—every reason which would make a protest competent and necessary evidence of presentment, and notice in case of a foreign bill, would recognize it as equally competent in respect to the indorser of the note. It has been well said that "the similarity between the indorsement of notes, and the drawing and indorsement of bills of exchange is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a different character of evidence to prove the same facts with regard to two instruments, which, tho' different in some respects as to their phraseology, are so essentially similar in their nature and operations."¹ And there are well considered cases sustaining it.² This view has been taken in Kentucky respecting an indorsed certificate of deposit."³

There are cases in which the converse view has been taken, it being considered that the certificate of protest of a promissory note, is a document unknown to the law; and altho' the note be payable on a foreign place, is inadmissible.⁴ But rules of evidence should not be so extremely and unreasonably technical. Every consideration of convenience and certainty which prevails in respect to foreign bills, applies with the same exact force to foreign indorsed notes, and should produce the same result. A general usage would probably be controlling.⁵

§ 4. As to the meaning of protest, it includes, in a popular sense, all the steps taken to fix the liability of a drawer or indorser, upon the dishonor of commercial paper to which he is a party.⁶ More accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the non-

¹ Parker, C. J., *Williams vs. Putnam*, 14 N. H., 540; *Carter vs. Burley*, 9 N. H., 558; *Smith vs. Little*, 10 N. H., 526.

² *Ticonic Bank vs. Stackpole*, 41 Maine, 302, held admissible at common law.

³ *Piner vs. Clary*, 17 B. Monroe, 645.

⁴ *Kirtland vs. Wanzer*, 2 Duer, 278.

⁵ See *Burke vs. McKay*, 2 Howard, 66.

⁶ *Townsend vs. Lorain Bank*, 2 Ohio St., 345; *Coddington vs. Davis*, 1 Comstock, 123.

acceptance, or even non-payment, as the case may be, of the bill in question; and a calling of the Notary to witness that due steps having been taken to prevent it.¹ The word "*Protest*" signifies to testify before; and the testimony before the Notary that proper steps were taken to fix the drawer's liability is the substance, and the certificate of the Notary the formal evidence, to which the term protest is legally applicable.

In what cases Necessary.

§ 5. According to the English law, the protest must be made in the case of dishonor by non-acceptance, as well as dishonor by non-payment. And the same rule prevails in the United States,² although it was decided by the Supreme Court of the United States, in an action on a protest for non-payment of a foreign bill, that a protest for, or notice of, non-acceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this country.³ But the English rule has been deemed the most consistent with commercial policy, by the highest authorities, and Story and Kent adopt it as the true one; the former observing that the decisions of the Supreme Court, if they would now be held law by that court, would be so held only upon the ground of the local law of Pennsylvania (to which State the decisions appertained). as to bills drawn or payable there.⁴

§ 6. There is no difference in respect to the necessity for protest, whether the bill be payable at a certain time after date or after sight, for, although it is not necessary to present a bill payable at a certain time after date until its maturity, yet if such a bill be presented for acceptance, and dishonored, it is necessary to make protest and give notice, in order to charge drawer or indorsers.⁵ But if a bill has been protested for non-acceptance, and its dishonor duly notified, it is not necessary to present it again for payment, and protest it separately for non-payment, or to give separate notice of non-payment.⁶

¹ Walker *vs.* Turner, 2 Grat., 536; Chitty, (13 Am. ed.)*458, top p. 516.

² Thompson *vs.* Cumming, 2 Leigh, 321; Mason *vs.* Franklin, 3 Johns, 202; Watson *vs.* Loring, 3 Mass., 557; Phillips *vs.* McCurdy, 1 Har. & J., 187; Sterry *vs.* Robinson, 1 Day, 11; Winthrop *vs.* Pepon, 1 Bay, 468.

³ Brown *vs.* Barry, 3 Dallas, 365; Clarke *vs.* Russell, 3 Dallas, 295, followed in Pennsylvania; Read *vs.* Adams, 6 Sergt. & R., 358.

⁴ 3 Kent Com., 95; Story on Bills, § 273, note; Edwards on Bills, 448; Chitty on Bills, (13 Am. ed.) 372, *332.

⁵ Bank of Washington *vs.* Triplett, 1 Peters, 25; U. S. *vs.* Barker, 4 Wash., C. C. 464; O'Keefe *vs.* Dunn, 6 Taunt, 305; S. C. 5 Maule & Sel., 282.

⁶ De la Torre *vs.* Barclay, 1 Stark. Part 2, 7; Thompson on Bills (Wilson's ed.) 308.

Notarial Charges.

§ 7. It is estimated by high authority that notarial charges are not a legal charge except where the protest is required by the law merchant, although it is certainly usual to pay them where they are reasonable, and made in good faith, and in conformity with usage.¹ It being an entirely unnecessary act to protest an inland bill or note in order to charge any party thereto, and purely voluntary and for his own convenience on the part of the holder, there is obvious force in this suggestion. But it is doubtless in almost every case the cheapest, easiest and safest way of proving notice. The defendant would be chargeable with costs of other testimony more cumbrous and more expensive, where liable, and custom has so extensively sanctioned the practice, that we anticipate the courts will be slow to hold that it is not a legitimate charge.

SECTION II.

BY WHOM, AND WHERE PROTEST SHOULD BE MADE.

By Whom the Protest Should be Made.

§ 8. As to the person by whom the protest should be made, it is necessary, as a general rule, that it should be made by a Notary Public in person. The Notary is a public officer, commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as in his own.² But when no Notary can be conveniently found, the protest may be made by any respectable private person of the place where the bill is dishonored.³

In England it is required by statute that in case of inland bills, the protest by a private person shall be made in the presence of two or more credible witnesses.⁴ And it has been said that when a private person protests a bill it should be done in the presence of two witnesses.⁵ Certainly it is sufficient if it be so made,⁶ but it does not appear be necessary to require witnesses to the protest of a foreign bill by a private person.⁷

¹ 1 Parsons N. and B., 646.

² See Southern Law Review for April, 1873, article "Presentment for Payment."

³ Burke vs. McKay, 2 Howard, 66; Read vs. Bank of Kentucky, 1 T. B. Monroe, 91.

⁴ 9 and 10 William III, ch. 17.

⁵ Bayley on Bills, 258, (5th ed.) No authority is referred to and "*Quare* if not confined to inland bills," say the editors of Chitty, see *infra*.

⁶ Story on Bills § 276. 1 Parsons N. and B., 633. Byles (Sharpswoods Ed.) top p. 395.

⁷ Brooks Notary p. 103. Chitty on Bills, (13th Am. ed.) top p. 374, 333, note 2.

Where the Protest Should be Made.

§ 9. As to the place of protest it is usually made at the place where the dishonor occurs.¹ When the protest is for non-acceptance, the place of protest should be the place where the bill is presented for acceptance.² But when the bill is drawn upon the drawees in one place, and is payable in another, the question has arisen, whether the protest should be at the place of acceptance, or place of payment. Mr. Chitty says in respect to protest for non-acceptance that "if a bill be drawn abroad directed to the drawee at Southampton or any other place requesting him to pay the bill in London, *the protest for non-acceptance*, may be made either at Southampton or in London."³ But as the presentment for acceptance must be at the former place, it would be better to make the protest for non-acceptance there also.⁴ It has been held that it is sufficient if the protest for non-payment where there has been a refusal to accept, be made at the place of the drawee's residence,⁵ and in England it being conceived that the decision cast

¹ Byles (Sharswoods ed.), top p. 396. ² Story on Bills, § 282.

³ Chitty on Bills, (13 Am. ed.) *334, top p. 374.

⁴ Thompson on Bills, 308 Marnus 107-8.

⁵ Mitchell *vs.* Baring, 4 Car. and p. 35; 10 Barn. and C. 8, (19 E. C. L. R., 261) The Code of Virginia, chapter 144, § 2, provides as follows: "If a bill of exchange wherein the drawer shall have expressed that it is to be payable in any place other than that by him mentioned therein to be the residence of the drawee, shall not, on the presentment thereof for acceptance, be accepted, such bill may, without further presentment to the drawee, be protested for non-payment in the place in which it shall have been, by the drawer expressed to be payable, unless the amount thereof be paid to the holder on the day on which the bill would have become payable, had it been duly accepted." This section was first incorporated in the Code of 1849, upon recommendation of the revisors, who said in their report to the General Assembly: "It is a general rule of law that the protest for non-payment is to be at the place where the drawee resides. In Mitchell &c. *vs.* Baring, &c., 4 Car. and Payne 35, 19 Eng. Com. Law Rep., 261, 10 Barn. and Cress. 4, 21 Eng. Com. Law Rep. 12, the drawer of a bill made in America, had expressed that it was to be payable in London, yet Liverpool, was mentioned therein as the residence of the drawee; on the presentment thereof for acceptance, it was not accepted, and the protest for non-payment was at Liverpool. Under particular circumstances appearing in the case, this protest was held sufficient, the general question whether, if the acceptance had been in the usual form, a protest in London would have been sufficient, was left undecided. It appeared from the evidence of several witnesses, some of them Notaries, and others merchants, that where a foreign bill, drawn upon a merchant residing at Liverpool, payable in London, was refused acceptance by the drawee, the usage was to protest it for non-payment in London. Yet, though this was the usage, the doubt arose after the decision in Mitchell, &c., *vs.* Baring, &c., whether such usage would be sustained by the Courts, and the statute of 2 and 3 Will. IV, ch. 98, was passed to remove the doubt. We propose, it will be perceived, to adopt the same statute in Virginia." Report of Revisors, p. 719.

a doubt upon the legality of making protest at the place specified for payment, the statute 2 and 3 William IV c. 98, was enacted declaring that a protest at the place of payment, in case of a refusal to accept, without further presentment to the drawee, should be sufficient. It is conceived that this statute was merely declaratory of the common law. Where there has been an acceptance by the drawee in one place, to pay in another, the latter would seem to be clearly the place for the protest to be made at.¹

§ 10. As to the law controlling the protest, it should be made according to the law of the place of presentment for acceptance if it be for non-acceptance, or of the law of the place where the bill is payable, if it be for non-payment; in other words, according to the law of the place where the dishonor occurs.²

SECTION III.

FORMAL MAKING, PREPARATION AND AUTHENTICATION OF PROTEST.

§ 11. As to the formality of making protest, and preparing the certificate thereof, it generally comprises three distinct steps: 1. Making the presentment, and demand of payment. 2. Noting the dishonor, and 3, extending the protest.

The Presentment and Demand of Payment.

§ 12. The first step taken is the presentment of the instrument to the drawee, or acceptor or maker, by the Notary, and a demand of payment. By the law merchant it is absolutely necessary that the Notary himself should make this formal presentment and demand. And, although the holder may have already presented the bill and demanded acceptance or payment, and been refused, it is still necessary that the presentment and demand which are to be made the basis of the Notary's certificate should be made by him *in person*. For otherwise his testimony contained in the protest would be hearsay, and secondary; and would lack the very element of certainty which the protest is especially designed to assure. Not even his clerk, nor, unless authorized by law, his deputy, can perform these functions for the Notary, as it is to his official character that the law imputes the solemnity and sanction which are accorded his

¹ Story on Bills, § 284, Thompson (Wilson's ed.) 309.

² Shanklin vs. Cooper, 8 Blackford, 41; Turner Rogers, 8 Ind., 139; Carter vs. Union Bank, 7 Hum., 48; Onondaga County Bank vs. Bates, 3 Hill, 53; Rotchild vs. Currie, 1 Q. B. 43.

certificate. The authorities on this subject are collated in an article on "Presentment for Payment," in the *Southern Law Review* for April of the present year.

Noting the Dishonor.

§ 13. As soon as the presentment and demand have been made, or at some seasonable hour during the same day, the Notary makes a minute on the bill, or in his book of registry, consisting of his initials, the month, the day, the year, the refusal of acceptance or payment, and his charges of protest. This is the preliminary step towards the protest which may be afterwards written out in full, extended as the elaboration of these minutes is termed, and it is called noting. "Noting" it was said in an early case, "is unknown to the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years."¹ But it is now quite well established in England, Scotland and the United States, that the noting is a kind of "initial protest," as Thompson aptly terms it, not self-sufficient as a protest, but sufficient in the meantime, if the certificate of protest is regularly extended afterwards.² It must be made on the *very day* of dishonor by non-acceptance or non-payment, otherwise it can not be made the basis of the extended protest.³ For the Notary will not be permitted to trust to his memory for the requisite particulars. It is to his cotemporaneous written statement that the law gives credit.⁴ Where, in Scotland, the original protest could not be used, because not properly stamped, it was allowed to be used as a note for extending a valid protest,⁵ and it seems unimportant in what particular form the noting is done.

Extending the Protest.

§ 14. The extension of the protest is the completion of the instrument of protest, from the minutes or "initial protest" as they are called, noted on down the day of dishonor. This extension may be made at any time. As said by Lord Kenyon: "If the bill was regularly presented, and noted at the time, the protest might be made at any future period,"⁶ and it is well settled to this effect in the

¹ *Leftly vs. Mills*, 4 T. R., 170, Buller, J.

² *Chaters vs. Bell*, 4 Esp., 48; *Geralopulo vs. Wieler*, 10 C. B., 690; 3 Eng. L. & Eq., 515; *Edwards on Bills*, 581; *Thomson on Bills*, (Wilson's ed.) 311; *Story on Bills*, (Bennett's ed.) 27, 6 note.

³ *Butler N. P.*, 373; *Thomson on Bills*, (Wilson's ed.) 315.

⁴ *Thomson*, 312. ⁵ *Ibid.*

⁶ *Chaters vs. Bell*, 4 Esp., 48; (1801); *Geralopulo vs. Wieler*, 10 C. B., 690; 3 Eng. L. & Eq., 515; *Robins vs. Gibson*, 1 Maule, & S., 288.

United States.¹ The extension may be made even after suit brought,² or after trial has commenced, and when made,³ it is antedated as of the day when the initial protest was made.

In Scotland the extension of a protest was permitted fifteen years after noting.⁴

In Cases of Payment supra Protest.

§ 15. It has been contended that in the case of payment for honor, which must be made *supra protest*, the formal extension of the protest must be made before the payment, on the ground that unless this were done, the allegation that the bill was continued and paid under protest, would not be proved, inasmuch as the protest should be understood to mean such protest as would give a right of action to the person paying for honor. But this distinction is not recognized. It is true that the declaration that *the payment was made for honor*, must precede the protest; and that the noting of such declaration, and of the dishonor, must be then made; and that unless the declaration were then made, no after act could give to the payment the character of payment *supra protest*.⁵ But the protest in this, as in other cases, may be extended at any time, provided it was duly noted.⁶

§ 16. When there is a protest for non-acceptance, and subsequently a protest for non-payment, it is not sufficient to simply note the bill for non-acceptance, and extend only the protest for non-payment, but wherever proof of protest is requisite the extended protest alone will suffice.⁷

Copy of Protest, and of Instrument Protested.

§ 17. If the drawer reside abroad, it has been said that a copy, or some memorial of the protest, should accompany the notice of dishonor.⁸ But is now well settled, that it is only necessary for the drawer or indorser, to receive a notice of the protest, without any copy or memorial of the instrument itself, in order to fix his liability, the protest not being necessary until the trial.⁹

¹ Bailey vs. Dozier, 6 Howard, 23; Bank of Decatur vs. Hodges, 9 Ala., 631; Cayuga Co. Bank vs. Hunt, 2 Hill, 635.

² Dennistown vs. Stewart, 19 Howard, 606; Brook's Notary, 97.

³ Orr vs. Maginnis, 7 East, 361; Byles, (Sharswood's ed.) 396.

⁴ Alexander vs. Scott, Thomson on Bills, 312.

⁵ Vanderwall vs. Tyrrell, 1 Mood & Malk, 87.

⁶ Geralopulo vs. Wieler, 10 C. B., 690; 3 Eng., L. & Eq., 515.

⁷ Rogers vs. Stephens, 2 T. R., 713; Orr vs. Maginnis, 7 East, 359.

⁸ Byles, (Sharswood's ed.) 399.

⁹ Goodman vs. Harvey, 4 Ad. & El., 870; (31 E. C. L. R.) Robins vs. Gibson. 1 Maule & S., 288; Cromwell vs. Hynson, 2 Esp., 511; Dennistown vs. Stewart, 17 Howard, 606; Lenox vs. Leverett, 10 Mass., 1; Wells vs. Whitehead, 15 Wend., 527; Wallace vs. Agry, 4 Mason, 336; Chitty on Bills, (13 Am. ed.) top p. 375, *344.

§ 19. It is usual, and highly important, to prefix a copy of the bill or note with all indorsements therein, *verbatim et liberatim*, to the instrument of protest, for the purpose of identifying the bill or note with certainty, and indicating to the drawer or indorsers, what party is entitled to payment.¹

How the Protest is Authenticated or Proved.

§ 19. The official seal of a Notary attached to the certificate of protest is everywhere received as a sufficient *prima facie* proof of its authenticity. The courts take judicial notice of the seal, and it proves itself by its appearance upon the certificate.² But it may be controverted as false, fictitious, or improperly annexed.³

§ 20. It is not essential to the admissability in evidence of the certificate of protest that it should be under the notary's seal; nor is it essential in all cases as already seen, that it should be made by the notary in person; but in either of these cases it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating, and is sufficient without a seal according to the laws of the country where it was made.⁴

§ 21. An impression of the notarial seal on the paper of the protest is *prima facie* sufficient, and it will be presumed to have been affixed according to the laws of the country where the dishonor occurred until there is something to impeach it.⁵ But it seems that a mere scrawl would not be.⁶

§ 22. It is well settled that where the laws of the State in which the protest is made, require that it shall be made under the notary's seal, it will not be received in evidence in another State without such seal, and, no other mode of authentication is available.⁷

§ 23. The protest should be signed by the notary; but if his act, in fact, it may be signed by his clerk in his name, or may be in printing, it being requisite only that it should be by his authority.⁸

¹ Story on Bills, § 276, Chitty (13 Am. ed.) *458, top p. 517.

² Nichols *vs.* Webb, 8 Wheat, 326; Tonnsley *vs.* Sumerall, 2 Peters, 170; Dickens *vs.* Beal, 10 Peters, 582; Mullen *vs.* Morris, 2 Barr, 86; Nelson *vs.* Fotterall, 7 Leigh, 180; Carter *vs.* Burley, 9 N. H., 558, Bryden *vs.* Taylor, 2 Har. & J., 399.

³ Ibid.

⁴ Carter *vs.* Burley, 9 N. H., 558; Chanoine *vs.* Fowler, 3 Wendell, 173.

⁵ Carter *vs.* Burley, 9 N. H., 558; Conolly *vs.* Goodwin, 5 Calif., 220; Bank of Manchester *vs.* Sason, 13 Vt., 334.

⁶ Carter *vs.* Burley, 9 N. H., 558.

⁷ Ticknor *vs.* Roberts, 11 La., 14; Bank of Rochester *vs.* Gray, 2 Hill. (N. Y.), 227; Wharton's Conflict of Laws, § 669, a.

⁸ Fulton *vs.* Macracken, 18 Md., 528.

SECTION IV.

CONTENTS OF PROTEST.

§ 24. The protest, or more strictly speaking, the notarial certificate thereof, should set forth: (1) The time of presentment; (2) the place of presentment; (3) the fact and manner of presentment; (4) the demand of payment; (5) the fact of dishonor; (6) the name of the party to whom presentment was made; and (7) the name of the person to whom presentment was made. And in respect to notice, it should state: (1) The person notified; (2) the manner of notification; and (3) when not served on the party in person, it should specify distinctly, whether it was delivered at his house or place of business; or, if sent by mail, that it was addressed to the post-office nearest to him, or at which he usually received his business letters. These, at least, are the elements of a regular and perfect protest. The admissibility of the protest as evidence of notice, and its statements in reference to notice, will be considered under a separate head.

§ 25. As to the time, it is essential that the time of presentment and demand should be stated, for otherwise it can not appear from the certificate that the bill was duly dishonored. And if it state that the bill was "this day protested" and is dated on a day previous to, or after the day of maturity, it is invalid upon its face.¹

It is better to state that the presentment and demand were made during the usual hours of business, but where the hour of the day is not stated, it will be presumed that they were made at the proper time of day.²

§ 26. As to the place—if the bill is not payable at a particular place, it is not absolutely necessary to state at what place the presentment and demand were made, but if it were payable at a bank, or other specified place, the certificate is insufficient unless it state presentment and demand at such place.³

§ 27. As to the manner and fact of presentment and demand, the presentment of the bill, and the demand of payment, should be separately stated. The usual expression of the certificate is, that the Notary "did exhibit said bill," and it is certain that there must be some expression importing *ex vi termini* that the bill

¹ Walmsley vs. Acton, 44 Barbour, 312.

² Burbank vs. Beach, 15 Barbour, 326; DeWolf vs. Murray, 2 Sandford, 166; Cayuga County Bank vs. Hunt, 2 Hill, 227.

³ People's Bank vs. Brooke, 31 Md., 7.

was presented to the drawee or acceptor.¹ The mere statement that payment was "demanded" has been held by the United States Supreme Court to be insufficient in itself, because not necessarily implying a "presentment also."² But there can be no legal demand without presentment, and the term "demanded" has been considered sufficient in Louisiana.³ The mere statement of "presentment" is not in itself sufficient without also a statement of demand.⁴

§ 28. As to the fact of dishonor, the dishonor of the bill must be stated, and it is usually expressed in the phrase that the person to whom it was presented "answered that it would not be accepted, or paid,"—or that such person "refused to accept or pay it,"—or some such language. If it does not, in some terms, inform the party of the dishonor, it is fatally defective.⁵ But it is not material what words are used. If it states that the reason of protest was its non-payment, it is sufficient.⁶

§ 29. As to the name of the person upon whom demand was made, it should be stated, especially when it was not made at the place of business of the drawer or acceptor. In the latter case, it is sufficient to describe the person as a clerk, or person in charge.⁷ If a firm were drawer or acceptor it would be fatally defective in not stating the name of the person on whom demand was made, as well as that he was a member of the firm.⁸

If the bill is payable at a bank, nothing more need be stated than that the Notary presented it, and demanded payment at the bank, and that it was refused, without stating the name of the person or officer of the bank to whom it was presented.⁹

§ 30. The certificate frequently states the name of the party who requests the protest to be made, and who looks to the drawer or indorser for payment, but this is not necessary.¹⁰

§ 31. It is said to be important that the reasons given by the drawee for non-acceptance, or non-payment, should be stated in the

¹ *Union Bank vs. Fowlkes*, 2 Sneed, 555; *Bank of Vergennes vs. Cameron*, 7 Barbour, 143.

² *Musson vs. Lake*, 4 Howard, 262; *Woodbury and McLean, JJ.*, dissenting on this point. ³ *Nott vs. Beard*, 16 Ia., 308.

⁴ *Nave vs. Richardson*, 36 Mo., 130; *Farmer's Bank vs. Allen*, 18 Md., 475.

⁵ *Taylor vs. Bank of Illinois*, 7 Monroe, 576; *Arnold vs. Kinloch*, 50 Barbour, (N. Y.) 44; *Littledale vs. Maberry*, 43 Maine, 264.

⁶ *Young vs. Bennett*, 7 Bush, (Ky.) 477.

⁷ *Nelson vs. Fotherall*, 7 Leigh, 179; *Stainback vs. Bank of Virginia*, 11 Grat., 260 *See Post*. ⁸ *Otsego Co. Bank vs. Warren*, 18 Barbour, 290.

⁹ *Hildeburn vs. Turner*, 6 Howard, 69.

¹⁰ *Duckert vs. Van Lienthal*, 11 Wisc., 56.

certificate of protest;¹ and it may be usual to do so. But the reasons for a refusal to accept or pay, while they may sometimes be of such a character as to excuse protest or notice, as against the drawer, are not an essential part of the protest, and it makes no difference if they are not stated.

§ 32. No mere verbal inaccuracy or mistake in the certificate of protest will vitiate it, if in fact the protest was properly made and the notice given. Thus, a misdescription of the acceptor as "*Chas.*" instead of "*And. E. Byrne,*" was held not fatal to the protest;² and so a mis-statement of the date.³

SECTION V.

THE PROTEST AS EVIDENCE.

§ 33. The original instrument of protest, or a duly authenticated copy, is respected by the courts of a foreign country—and whenever admissible in testimony is regarded as *prima facie* evidence of all the acts therein stated, so far as they come within the scope of the Notary's duty in making the presentment, and demand, and protest.⁴ But it is *prima facie* evidence only, and any statement made in the protest may be rebutted by any competent testimony to the contrary.⁵

Although the Notary when examined has no recollection of the facts stated in the certificate of protest, it is still *prima facie* evidence until contradicted.⁶

But as, by the law merchant, the protest is only necessary, or receivable as evidence of dishonor, in the case of foreign bills, or of indorsed notes which are of the nature of foreign bills, and come within the reason of the law respecting them, the protest of an inland bill or of an inland promissory note, is not evidence of dishonor in a foreign State, although it may be in the State where the dishonor occurred by statute.⁷ And where a State statute makes the protest, when executed by a Notary of that State, evidence as to demand and notice, it does not authorize the Notary to act beyond

¹ Chitty on Bills, (13 Am. ed.) *458, top p. 516-17; Story on Bills, § 276.

² Dennistoun vs Stewart, 17 Howard, 606.

³ Bank at Decatur vs. Hodges, 9 Ala., 631.

⁴ Townsley vs. Sumrall, 2 Peters, 170, Chase vs. Taylor, 4 Har. & J., 54.

⁵ Dickens vs. Beal, 10 Peters, 582; Ricketts vs. Pendleton, 14 Md., 320; Union Bank vs. Fowlkes, 2 Sneed, 555; Nelson vs. Fotherall, 7 Leigh, 180.

⁶ Sherer vs. Easton Bank, 33 Penn. St., 134.

⁷ Duchess Co. Bank vs. Ibbottson, 5 Denio, 110; See Kertland vs. Wanzer, 2 Duer. 278, on this point. But see *supra* as to other points in which it is not approved.

its territorial limits, or accord the same effect to his act when beyond them.¹

By the Law Merchant Protest not Evidence as to Notice.

§ 34. When the Notary who has in charge the bill for presentment, has presented it for acceptance or payment as the case may be, and has protested it in the event of its dishonor by a refusal, his official duty is fulfilled; and it is incumbent on him to go farther and give notice.² Although, if the holder desires him to do so, he may as well as a private person, act as his agent in giving notice.³ It being no part of the Notary's *official* duty to give notice, which is entirely distinct from the protest, the certificate of protest made out by the Notary is not by the law merchant evidence of any fact stated therein respecting the service or transmission of notice, but only of such things as pertain to this official duty in respect to the protest.⁴ By statute, however, it is very generally provided that the certificate of protest shall be evidence of the facts stated therein respecting notice, it being found by experience to be a more convenient and as reliable a method, as any other of making the proof. Prof. Parsons expresses the opinion that without the aid of a statute, the certificate is evidence "not only of presentment, demand and dishonor, but of such notice as it asserts to have been given."⁵

How Notice Proved.

§ 35. The notice must be proved by the Notary himself when he gives it, or by other witnesses in depositions duly taken as in any other case, or by examination *ore tenus*, at the trial.⁶ The certificate of protest is in no sense, unless by statutory enactment, a certificate of notice, nor is a certificate of the notary subjoined to the protest, nor a separate affidavit of the Notary admissible to prove the fact, it not being a legal form of testimony.⁷ When the Notary undertakes to act as agent of the holder, the engagement does not enure to the

¹ *Duchess Co. Bank, vs. Ibbottson*, 5 Denio, 110.

² *Dickens vs. Beal*, 10 Peters, 582; *Morgan vs. Van Ingen*, 2 Johns, 204; *Miller vs. Hackley*, 5 Johns, 384; *Bank of Rochester vs. Gray*, 2 Hill, 231, *Brooks' Notary*.

³ See *Southern Law Review* for April, 1873, article "Presentment for Payment."

⁴ *Dickens vs. Beal*, 10 Peters, 582; *Walker vs. Turner*, 2 Grat., 536; *Williams vs. Putnam*, 14 N. H., 540; *Rives vs. Parmley*, 18 Ala., 256.

⁵ 2 *Parrons, N. & B.*, 498; *Bank of Rochester vs. Gray*, 2 Hill, 231, disapproving *Cape Fear Bank vs. Steinmetz*, 1 Hill, 45.

⁶ *Dickens vs. Beal*, 10 Peters, 582; *Miller vs. Hackley*, 5 Johns, 384; *Lloyd vs. McGair*, 3 Barr, 482.

⁷ *Walker vs. Tavner*, 2 Grat., 536; *Bank of Vergennes, vs. Cameron*, 7 Barb., 144.

benefit of any one but his principal, and, therefore, where the Notary had engaged to give notice to the first and second indorsers, but only gave it to the second, of whom the holder received the amount of the bill, the second indorser who paid it could not sue him for not giving notice to the first.¹

Protest only Evidence of Facts Stated.

§ 36. It can not be inferred from the mere fact of protest, when it is admissible as evidence of the manner and service of notice, or of the facts stated respecting the giving of notice, that any step was regularly taken, or any fact existed, which is not certified to. In other words, the admission of the certificate of protest as evidence, only makes it evidence of such things as it distinctly states, and purports to give evidence of.

Therefore, where the certificate of protest is, by statute admissible evidence of the facts stated as to notice, and it simply states that notice was addressed to the indorser at a certain place, without adding that such place was the post-office or residence of the indorser, there can be no inference that such was the fact; and the certificate is consequently insufficient in itself to prove due notice.² So where the protest states that notice of protest "*was left at the boarding house of A. B.,*" it is not sufficient evidence that it was left in the proper manner. And where it states presentment of a note payable at bank to the cashier, it is not to be inferred that the note was in the bank, or unless it was in the bank, that the cashier was at the bank, but that might be proved by other testimony.³

§ 37. As to the mere fact that due notice was given, however, when there is no question raised as to the person upon whom, or the place where, it was served, the certificate that "due notice was given, or mailed, or that the person was duly notified, is sufficient evidence that the notice in itself corresponded to the protest, and was in proper legal form.

A legal notice is a definite legal instrument, and where a statute makes the certificate of the Notary evidence as to the service, or as to the facts stated, respecting notice, it would seem, that his certificate that notice was given, would be as definite as if it detailed the

¹ Morgan vs. Van Ingen, 2 Johns, 204.

² Raine vs. Rice, 2 Pat. & Heath, 529; Turner vs. Rogers, 8 Ind., 139; Bradshaw vs. Hedge, 10 Iowa, 402.

³ Magann vs. Walker, 49 Maine, 420; Seneca County Bank vs. Meass, 5 Denio, 329.

minutiae of the instrument thus described.¹ But it has been held, that the protest unless it states the contents of the notice, is only evidence that *what purported* to be notice was sent, and not of its sufficiency in law.² It seems to us that the separate facts as to service and place, and person should be stated, but that the contents of the notice are to be presumed to be conformable to law.

Presumptions in Favor of Protest.

§ 38. But legal presumptions are made in favor of the protest under proper circumstances. Thus, when the certificate of protest states that demand was made of the clerk of the drawee, found at his office or place of business, the drawee himself being absent, it is evidence not only of the fact of demand, but also that the person named was the drawee's clerk, duly authorized to refuse acceptance or payment.³ And it would be presumed, if not stated, that the drawee was absent.⁴ So (where it is evidence as to notice), if it state that notice was left "*at the indorser's desk in the custom house, he being absent, with a person in charge,*" it is *prima facie* evidence that such was his place of business, and that it was properly left there, it not appearing that better service could have been made.⁵ So, if it states demand at his office, or place of business, of his book-keeper,⁶ or agent,⁷ it is evidence that such person was the drawee's agent. But unless the demand was at the drawee's place of business, it would be different; and where the protest was legal evidence of the manner of service of notice, it was held, nevertheless, that the certificate that "a notice to D. B. P., the indorser, was left at the residence of J. P. S., his attorney in fact, with a female white servant, the said J. P. S. not being in," was not evidence that S. was P.'s attorney in fact to receive notice, but only of such matters as it was the Notary's duty to certify.⁸

¹ *Tate vs Sullivan*, 30 Md., 464; *Pattee vs. McCrillis*, 53, Maine 410; *Orono Bank vs. Wood*, 49 Maine, 26; *Lewistown Bank vs. Leonard*, 43, Maine 144; *Ticonic Bank vs. Stackpole*, 41 Maine, 321; *Simpson vs. White*, 40 N. H., 540; *Bushworth vs. Moore*, 36 N. H., 144; *Golladay vs. Bank of Union*, 2 Head, 57; *Union Bank vs. Middlebrook*, 33 Conn., 95; *McFarland vs. Pico*, 8 Cal., 626; *Kern vs. Van Phal*, 7 Minn., 426.

² *Ducket vs. Van Lienthal*, 11 Wis., 56; *Smith vs. Hill*, 6 Wis., 154; *Kimball vs. Bowen*, 2 Wis., 224.

³ *Nelson vs. Fottorall*, 7 Leigh, 179; *Stainback vs. Bank of Virginia*, 11 Grat., 260; *Whaley vs. Houston*, 12 La. An., 585.

⁴ *Gardner vs. Bank of Tenn.*, 1 Swan, 420.

⁵ *Bank of Commonwealth vs. Mudgett*, 44 N. Y., 514.

⁶ *Phillips vs. Poindexter*, 18 Ala., 579.

⁷ *Dickerson vs. Turner*, 12 Ind., 223.

⁸ *Drumm vs. Bradfute*, 18 La. An., 681. See, also, *Fortier vs. Field*, 17 La. An.

evidence is admissible to supply the omission, provided it be in furtherance of, and not inconsistent with or contrary to, the statements that are made in the protest. Thus, where the protest stated a demand of the cashier, but omitted to state that the note was in, or the cashier at the bank, it was held admissible to prove these facts by parol testimony.¹ So, where it did not state where the presentment and demand were made, or that the note was in the bank where it was made payable;² or where it fails to inform the indorser of a demand on the maker and a refusal,³ or to state the fact of non-payment,⁴ any legitimate extrinsic evidence is admissible to shew that any of these facts existed, or steps were taken. Any, if there be any question as to the agency of the person to whom presentment was made, evidence is admissible to shew it.⁵

In like manner, any defect in the statements respecting notice may be supplied,—and indeed, as we have seen, notice may be proved without any aid from the protest, which is only admissible, and not necessary evidence of it.⁶

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¹ *Magonn vs. Walker*, 49 Maine, 420; *Seneca Co. Bank vs. Nease*, 5 Denio, 329.

² *Wetherall vs. Claggett*, 28 Md., 465; *Hunter vs. Van Bomhorst*, 1 Md., 504.

³ *Wetherall vs. Claggett*, 28 Md., 465; *Nailor vs. Bowie*, 3 Md., 252.

⁴ *Sascer vs. Farmer's Bank*.

⁵ *Stainback vs. Bank of Va.*, 11 Grat., 269.

⁶ *Graham vs. Sangston*, 1 Md., 59.

*Digest of English Law Reports for February, March,
and April, 1873.*

(COMMON LAW AND EQUITY SERIES.)

AGREEMENT FOR SETTLEMENT.

After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V. being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will, in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter, absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property (which, I suspect, will exceed £4,000), shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he devised and bequeathed parts of his property to his wife, and gave several life annuities.

Upon bill by the daughter, claiming to have all the property of which the testator died seized or possessed settled upon her in strict settlement:

Held, that the above expressions of intention on the part of the testator amounted to a contract to settle the whole of the property of which he should die seized or possessed upon the plaintiff in strict settlement: *Coverdale v. Eastwood*, V.-C. B., 121, L. R., vol. 15.

ASSETS EMPLOYED IN TRADE.

A testator was partner in a well established and prosperous business, under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stock-taking, and to be paid by instalments extending over two years, with interest at £5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at £5 per cent. per annum with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors, claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the plaintiff, approved of what had been done:

Held (reversing the decision of Bacon, V.-C.), that the plaintiff was not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving him estate any right to share in the profits of the business.

The testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1600 out of the testator's personal estate. This villa had ever since been let at £80 a year, most of the other land had been sold, and the evidence tended to show that the outlay had benefited the estate. Vice-Chancellor Bacon having declared that the £1600 must be disallowed the trustees in passing their accounts:

Held, on appeal, that as the trustees had, in the *bona fide* exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure: *Vyse v. Foster*, L. JJ., 309, L. R., vol. 8.

BILL OF LADING.

The plaintiffs delivered to the defendants, for carriage on board the defendants' ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp, the words "Weight, value and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at its destination, it was found that two pieces of silk had been abstracted from the case. In an action by the plaintiffs against the defendants as common carriers for non-delivery of the silk goods so lost:

Held, that the result of the addition of the words "Weight, value and contents unknown" to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently the defendants' contract was to carry the case and its contents, whatever they might be; and the plaintiffs were entitled to maintain the action. *Quære* whether, even without the additional words, the misrepresentation having been made without fraud, could have had the effect of avoiding the contract for carriage of the goods by the defendants as common carriers: *Jessel v. Bath* (Law Rep. 2 Ex., 267) followed; *Lebeau v. The General Steam Navigation Company*, C. P., 88; L. R., vol. 8.

CHAMPERTY.

Declaration, that J. H., a brother of the defendant and a cousin of the plaintiff, had died, leaving large real and personal property; that defendant was heir at law of J. H., and one of his next of kin; that J. H. left a will whereby his real and personal property was left to persons other than plaintiff and defendant, and plaintiff believed that the will revoked a former will by which J. H. had bequeathed property to plaintiff; and that in consideration that plaintiff would take the necessary steps to contest the will, and would advance money and obtain evidence for such purpose and instruct an attorney, defendant promised to share with plaintiff half the real and personal property which might come to defendant by reason of such proceedings:

Held, that the agreement amounted to champerty; and that the fact that the plaintiff was a relation of the defendant, and had some collateral interest in the suit did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty: *Hulley v. Hulley*, Q. B., 112; L. R., vol. 8.

COSTS.

An action involving long accounts between plaintiff and defendant was referred; and it was ordered that plaintiff, by an accountant to be named by the arbitrator, should have inspection of, and take extracts from, defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in plaintiff's favor, with the costs of the action, reference, and award.

On taxation, *Held*, that the case came within the ordinary rule; and that plaintiff was not entitled to the costs of the preliminary examination of the books by the accountant: *Nolan v. Copeman*, Q. B., 84; L. R., vol. 8.

CY-PRES.

A testatrix, after stating to the effect that as she could not feel confidence that any of her relatives would spend her money in the way she would approve, she felt she was doing right in giving it in charity, bequeathed her residuary personal estate, consisting of pure personalty, to trustees upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. She further directed that when and so soon as land should at any time be given for the purpose as thereafter mentioned, almshouses should be built in three specified places. And she further directed that the surplus remaining, after building the almshouses, should be appropriated to making allowances to the inmates:

Held, (reversing the decision of the Master of the Rolls), That the residue was well given in charity, for that the gift to charity was not conditional and contingent, but there was an absolute immediate gift to charity, the mode of execution only being made dependent on future events, and an inquiry directed as in *Sinnett v. Herbert*, (Law. Rep. 7 Ch. 232): *Chamberlayne v. Brockett*. L. C. & L. JJ., 206, L. R., vol. 8.

DAMAGES.

The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London, in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered, they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair, which, in consequence of the cessation of the French war, was, apart from the previously mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd of February, instead of the morning of the 4th. In an action against the defendants for the delay in delivering the shoes, they paid into court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched.

Held, (per Kelly, C. B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B.; Lush, J., and Pigott, B., dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising.

ing naturally from the defendant's breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract; (Per Kelly, C. B., Blackburn, J., and Mellor, J., and Cleasby, B.,) the notice given to the defendants was not such that they could reasonably be supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed; (Per Martin, B., and, *semble*, per Blackburn, J., and Lush, J.,) a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of the contract that the defendants will be liable for such damages if the contract be broken; (Per Lush, J., and Pigott, B.,) the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned. *Hadley v. Bazendale*, (9 Ex. 841; 23 L. J., (Ex.) 179), discussed. *Horne v. Midland Railway Company*, C. P. 181, L. R. vol. 8.

DEFECTIVE EXECUTION.

A lady having a power of appointment by deed or will over certain leasehold property, which, in default of appointment, was vested absolutely in her, wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she proceeded: "If I die suddenly, I wish my eldest son to have it. My intention is to make it over to him legally, if my life is spared." She died within three months, leaving this memorandum among her papers, and without having otherwise exercised her power:

Held (affirming the decision of the Master of the Rolls), That the memorandum was a defective execution of the power, and that equity would relieve against the defect in favor of the eldest son: *Kennard v. Kennard*. L. JJ., 227, L. R. vol. 8.

DEPOSIT OF DEEDS.

The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:

Held (affirming the decision of the Master of the Rolls), that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority: *Dixon v. Muckleston*. L. C. 155, L. R., vol. 8.

DEVISE OF MORTGAGED ESTATE.

The lessee of a term of years in four houses assigned the term, by way of mortgage to the owner in fee of the immediate reversion, who afterwards devised the houses by the description of "my freehold houses, Nos. 5, 6, 7, and 8, Stock Street," and was at the time of his death in possession as mortgagor:

Held (affirming the decision of the Master of the Rolls), that the mortgage debt did not pass under the devise, but formed part of the testator's personal estate. *Boss v. Barlow*. L. C., 171, L. R. vol. 8.

GIFT "TO MY RELATIVES."

Testatrix directed all her property at the death of A. and B. "to pass to my relatives in America":

Held, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in America then living were entitled as joint tenants: *Eagles v. Le Bredon*, M. R., 148, L. R., vol. 15.

INJURY TO PRIVATE INDIVIDUALS.

A municipal corporation having, under the provisions of an Act of Parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas company already existed, having similar powers within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging, as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township, which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them:

Held, on demurrer, that the alleged injury was not such as entitled the plaintiffs to maintain the suit: *Pudsey Coal Gas Company v. Corporation of Bradford*, V.-C. M., 167, L. R., vol. 15.

NEGLIGENCE.

A master can not maintain an action for injuries which cause the immediate death of his servant. Declaration against defendant for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of E.'s services, and her burial expenses. Pleas, 3, that E. was killed on the spot; 4, that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted. On demurrer to these pleas:

Held, first (by Kelly, C.B., and Pigott, B.; Bramwell, B., dissenting,) that the 3rd plea was good; secondly (by the whole Court), that the 4th plea was bad: *Osborn v. Gillett*, Ex., 88, L. R., vol. 8.

PAYMENT TO ONE TRUSTEE.

A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:

Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment: *Lee v. Sankey*, V.-C. B., 204, L. R., vol. 15.

PURCHASE FROM AGENT.

A. being aware that B. wished to obtain shares in a certain company, represented to B. that he, A., could procure a certain number of shares at £3 a share. B. agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to A. £3 a share. He afterwards discovered

that A. was in fact the owner of the shares, having just bought them for £2 a share:

Held, that, on the facts, A. was an agent for B., and A. ordered to pay back to B. the difference between the prices of the shares.

Decree of the Master of the Rolls reversed: *Kimber v. Barber*, L. C., 56, L. R., vol. 8.

RAILWAY COMPANY.

Declaration, that plaintiff was a passenger by defendant's railway, and they so negligently conducted themselves in the management of their railway that an engine and tender came into collision with the train in which plaintiff was traveling, and he was injured thereby. Plea, that defendants received plaintiff to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that plaintiff should travel at his own risk. Replication, that it was by reason of the gross and willful negligence of defendants that the accident happened:

On demurrer, *Held*, that the replication was bad; for that, whatever gross and willful negligence might mean, plaintiff, by the terms on the pass, had agreed that defendants should not be liable for the consequences of any accident happening in the course of the journey for which they would otherwise have been liable: *McCaskey v. Furness Railway Company*, Q.B., 57, L. R., vol. 8.

SECURITIES FOR BILLS OF EXCHANGE.

L. & Co. employed S. & Co. as their correspondents at Havana, and R. as their correspondent in London. They consigned certain cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. This they accordingly did, and the bills were accepted by R. Before the bills came to maturity, S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent:

Held, (affirming the decision of Bacon, C. J.), that the remittances must be applied to meet the acceptances, under the rule of *Ex parte Waring* (19 Ves., 345).

It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable: *Ex parte Smart; In re Richardson*, L. J., 220, L. R., vol. 8.

SEPARATE ESTATE.

A wife being executrix of her father, paid money she received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn checks upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:

Held, upon the facts of the case, that the wife was merely the agent of the husband, and that the money remaining in the bank belonged to his estate, and not to the wife's.

Decision of Malins, V. C., reversed: *Lloyd v. Pughe*, L. C. & L. J., 88, L. R., vol. 8.

SURETY.

To an action on a bond defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J.; that afterwards a composition deed was made between J. of one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors,

"in like manner" as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant:

On demurrer, *Held* (by Kelly, C. B., and Bramwell, B.; Pigott, B., dissenting), a good plea: *Crage v. Jones*, Ex., 81, L. R., vol. 8.

SURVIVORSHIP.

A testator gave a sum of money in sixths, and directed his trustees to hold one-sixth in trust for each of his six daughters for life, with remainder to her children, to be transferred and vested at twenty-one or marriage; and he provided that in case any of his daughters should die without leaving a child, then her share should go in trust for his surviving daughters in equal shares, if more than one, during their respective lives, and after their decease for their respective children *per stirpes*, and not *per capita*, in the same manner as the original shares:

Held, that on the death of a daughter without leaving a child who attained twenty-one or married the children of other daughters who had predeceased her took shares in her one-sixth.

The principles upon which the court considers the word "survivor" as not completely expressing the testator's intention, discussed.

Decision of the Master of Rolls reversed: *Waite v. Littlewood*, L. C., 70, L. R., vol. 8.

VENDOR AND PURCHASER.

A dispute arose between the trustees for a deceased vendor and a purchaser, the purchaser claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, and in the meantime the rest of the land was allowed to lie waste:

Held (affirming the decree of the Master of the Rolls), that the purchaser must be allowed to set-off against the interest payable by him, the amount of rent which might have been received, and the amount of deterioration: *Phillips v. Silvester*, L. C., 173, L. R., vol. 8.

SELECTED DIGEST OF STATE REPORTS.

[For this number of the Review selections have been made from the following State Reports: 57 Illinois, 86 Indiana, 68 North Carolina, 51 New Hampshire, 52 New Hampshire, 1 South Carolina (new series), and 14th Wallace (United States Supreme Court).]

ABANDONED AND CAPTURED PROPERTY.

An inference that the proceeds of captured and abandoned property had been paid into the treasury, drawn from the *prima facie* presumption of law that the military and fiscal officers of the United States had done their official duty. The money restored to a loyal owner accordingly: *United States v. Crusell*, 14 Wallace, 1.

ACTS OF CONGRESS.

For the furtherance of hearing claims against the government in the Court of Claims not to be interpreted in a narrow spirit, and so as to give substantial effect to technical defenses: *Cross v. United States*, 14 Wallace, 479.

AGENT.

As ex. gr. the cashier of a bank, when made consignee of goods under a bill of lading, may libel vessel for their non-delivery: *The Thames*, 14 Wallace, 98.

AGENCY.

1. A traveling merchant, who is authorized to sell all the goods of his principal that he can sell, within his business circuit, on a commission of ten per cent, is to be regarded as the general agent of his principal, and clothed apparently with the power of fixing the price, and the time and mode of the delivery of the goods, and the payment of the price, unless a different usage in such trade be shown: *Daylight Burner Co. v. Odlin*, 51 N. H., 56.

2. And third persons will not be affected by a limitation on this authority, which is not brought to their notice, or in relation to which they are not put upon inquiry: *Ib.*, 56.

3. Therefore, when such agent has sold goods on credit, which are forwarded by his principal by express, and marked "cash on delivery," the expressman, having no notice of any limitation of the agent's authority, may, upon the order of the agent, deliver the goods without payment of the price: *Ib.*, 56.

4. It was held, also, that whether the entry of "cash on delivery" put the expressman on inquiry, was a proper question for the jury: *Ib.*, 56.

5. Ordinarily the cashier of a bank has no authority to discharge its debtors without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that he would have no further trouble from it: *Cochecho National Bank v. Hankell*, *Ib.*, 116.

6. If, upon inquiry by the surety, the cashier, knowing that he is a surety, inform him that the note is paid, intending that he should rely upon his statement, and the surety does so, and in consequence changes his position by giving up securities, or indorsing other notes for the same principal, or the like, the bank will be estopped to deny that such note is paid: *Ib.*, 116.

ARREST.

The amount of force which an officer may lawfully use in making an arrest is as much as is necessary to effect his object, and where he is charged with having ex-

ceeded that limit, the jury must judge of the necessity, not the officer. If the amount of force used is more than the occasion requires, he is criminally liable for the excess: * *Golden v. State*, 1 S. C. (Richardson), 292.

BANK NOTES.

1. The maker of a note due a bank has a right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank: *Blount, Commissioner of Bank of Washington, v. Windley*, 68 N. C., 1.

2. A bank can not, by assignment of its effects, chooses in action, &c., deprive a maker of a note due the bank of his right to pay the same with the bills of the bank; nor can the bank, by any authority derived from the Legislature, deprive the maker of such right of payment of a note due the bank, in bills of the bank: *Ib.*

BANKRUPT ACT.

1. A judgment by confession when both parties to it knew of the insolvency of the debtor, though taken before the first day of June, 1867, is an unlawful preference under the 35th section of the Bankrupt Act, if taken after the enactment of the law: *Traders' Bank v. Campbell*, 14 Wallace, 87.

2. The proceeds of the sale of a bankrupt's goods being in the hands of one sued as a defendant, another person who had a like judgment and execution levied on the same goods, is not a necessary party to this suit, being without the jurisdiction. The rule laid down as to necessary parties in Chancery: *Ib.*

3. The proceeds of the sale being in the hands of a bank, though it had given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the State court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale and held the proceeds in its vaults: *Ib.*

4. The defendant having money received as collections for the bankrupt, delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taking by process under the act, and does not raise the question whether if the defendant had retained the money, it could be set off in this suit against the bankrupt's debt to the defendant: *Ib.*

5. So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off: *Ib.*

BANKRUPTCY.

Proceedings in a State court to enforce a lien, pending at the commencement of proceedings in bankruptcy, are not affected by the latter, but the creditor may go on to obtain satisfaction out of the lien. It is otherwise as to a personal judgment against the debtor: *Baum v. Stern*, 1 S. C. (Richardson), 415.

BILL OF LADING.

1. The bill delivered to the shipper of the goods shipped is the bill that makes

*This is undoubtedly well established law, and ought to be printed and hung up in the police headquarters in all our cities and towns. Acts of revolting cruelty are now and then committed by naturally savage men who, it would almost seem, purposely seek positions on the police force to better secure opportunities of gratifying brutal feelings, thinking to go unwhipped of justice; because ostensibly in her employ. Acts of this kind have been committed in this city (Nashville), and that quite recently, by at least one member of the police force, that for inhuman brutality can hardly find parallel, and yet, although it has been called to the attention of the city authorities, nothing whatever is done, or will be done.

the contract concerning them, and if it is different from the one retained by the ship, it and not the "ship's bill," is evidence of the contract: *The Thames*, 14 Wallace, 98.

2. Goods shipped under a bill of lading must be delivered to the person named in it or to his order, and under no circumstances may be delivered to a mere stranger. The obligation of the ship stated where the indorsee of the bill is unknown: *Ib.*

3. The indorsee of a bill of lading may libel a vessel for non-delivery of the goods shipped, though he be but an agent or trustee of the goods for others: *Ib.* And see *The Vaughan v. Telegraph*, 258.

4. A "clean" bill of lading, that is to say, a bill of lading which is silent as to the place of storage, imports a contract that the goods are to be stowed under deck: *The Delaware*, 14 Wallace, 579.

5. This being so, parol evidence of an agreement that they were to be stowed on deck is inadmissible. *Ib.*

CARRIER.

1. The defendants, who were common carriers between P. and B., carried from P. to B., a parcel directed to R., a place beyond their route, and delivered it to the next carrier, according to the usage of the business, and the parcel was lost beyond B. The judge who tried the facts did not find an undertaking of the defendants for carriage beyond B., and thereupon gave a general verdict for the defendants:

Held, that there was no ground for setting aside the verdict: *Gray v. Jackson*, 9 N. H., 51.

2. When a contract is made by a common carrier in one State to transport goods from that State into another, and the goods are lost, the rights of the parties are governed by the law of the State in which the loss happens: *Ib.*, 9.

CHANCERY.

1. It is only in cases that commend themselves strongly to equitable relief, that a court of equity will interpose to vacate a judgment at law; and though the power of the chancellor to control the courts of general jurisdiction, to set aside, modify and otherwise interfere with judgments at law, is now conceded and fully established, yet it is upon fixed and determinate rules alone that the jurisdiction will be exercised: *Holmes v. Stetler*, 57 Ill., 209.

2. Judgments at law will not be vacated capriciously, or as a mere matter of discretion, nor because the chancellor would, on the evidence heard in the suit at law, have arrived at a different conclusion from that reached by the jury: *Ib.*

3. Where a party has been brought into a court of law, and has had an opportunity of interposing a defense, and fails to do so, the repose of society requires that by the judgment then rendered the litigation should there end and the controversy terminate, unless by accident, mistake or fraud, the party has been prevented from interposing his defense, establishing his claim. And even though the judgment is manifestly wrong in law and in fact, or when allowing it to stand will compel the payment of a debt the defendant does not owe, unless it appears it was obtained by fraud, or was the result of accident or mistake, relief in equity will not be granted: *Ib.*

4. Where, however, a party, after making every effort in his power to discover evidence fails, upon its being afterwards discovered, a court of equity will treat this as an accident, and will, when satisfied that such evidence would have produced a different result, and that the judgment thus obtained is unjust and should not be paid, grant a new trial; but all these requirements must concur before it will interpose its power to afford relief. It must appear that the judgment is manifestly wrong; that the evidence has come to the knowledge of the complainant after the trial; that he

had exhausted all reasonable means and efforts to discover it before the trial, and that it would, without a reasonable doubt, when introduced on a new trial, produce a different result—it is not enough that the newly discovered evidence only renders it probable that a different result would follow: *Ib.*

5. The newly discovered evidence, to be availing, must not be cumulative merely: *Ib.*

COLLISION.

The fact that a steamship is in charge of a pilot taken conformably to the laws of a State, is not a defence to a proceeding *in rem* against her for a tortuous collision; the laws of the State providing only that if a ship coming into her waters refuse to receive on board and pay a pilot, the master shall pay the refused pilot half pilotage, and no penalty for the refusal being prescribed. *The China* (7 Wallace, 58) affirmed: *The Merrimac*, 14 Wallace, 199.

CONSTITUTIONAL LAW.

1. An act so changing existing remedies as materially to impair the rights and interests of creditors, is within the inhibition of the Constitution of the United States in reference to laws "impairing the obligation of contracts:" *State v. Bank of the State of S. C.* 1 S. C., 64.

2. New tribunals may be established by the Legislature for the trial of offenses previously committed: *State v. Shumpert*, *Ib.* 85.

CONTRACT.

1. In the matter of a contract, a distinction sometimes exists between a *motive* which may induce entering into it and the actual consideration of the contract. This subject illustrated: *Philpot v. Gruninger*, 14 Wallace, 570.

2. A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C: *Ib.*

3. Confederate treasury notes, which were in ordinary use during the rebellion, how far a valid consideration for: *Delmas v. Ins. Co.*, *Ib.*

4. Equity will not readily set aside a reasonable one, made for the sake of peace, though want of money may have been an inducing cause with one of the parties to the making of it: *French v. Shoemaker*. *Ib.*, 315.

5. Where any part of the consideration of a contract is illegal, that may vitiate the whole contract; but where a part of the consideration of a contract with one party is a contract of the other party, which is void or voidable, but not illegal, that does not taint the whole consideration, or make void what would otherwise be valid: *Crawford v. Parsons*, 18 N. H., 293, questioned: *Clements v. Marston*, 31 N. H., 52.

CORPORATE SECURITIES.

When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder for any infirmity, than any other commercial paper: *City of Lexington v. Butler*, 14 Wallace, 282.

COUPON.

Statutes of limitation will not bar suit on, unless the time be sufficient to bar suit on bond also: *City of Lexington v. Butler*, 14 Wallace, 282.

COVENANT.

1. In contracts for the purchase and sale of real estate, where the vendee refuses to

receive the deed and pay for the land, the measure of damages which the vendor may recover in a suit at law is the difference between the price agreed to be paid for the land, and its real value at the time the contract was broken: *Griswold v. Sabin*, 51, N. H., 167.

2. In such case, where the defendant refuses to receive the deed and pay for the land, it is immaterial whether the plaintiff keeps or sells the land, and if he sells it he is not bound to obtain the defendant's consent to the sale, or to consult him in relation thereto: *Ib.*, 167.

DEED.

1. Monuments must control courses and distances, even if it cause a wide departure from them: *Coburn v. Cozeter*, 51 N. H., 158.

2. If in any case the course and distance can be allowed to control the monuments, it can only be when from the terms of the deed the intention that they should control is manifested so strongly as to indicate a mistake in the description of the monument: *Ib.*, 158.

3. A conveyance of a strip of land itself, in explicit terms, with a restriction that it shall be used only for a road, is nevertheless a grant of the fee, and not of a mere easement: *Ib.*, 158.

DIVORCE.

Courts have power to set aside or vacate decrees of divorce for fraud or imposition, as in the case of other judgments, and will exercise that power where such fraud or imposition is clearly established: *Adams v. Adams*, 51 N. H., 388.

DOWER.

A widow is entitled, in equity, when dower is assigned her, to an account of rents and profits, or, if money be assessed in lieu of dower, to interest: *Clark v. Tompkins*, 1 S. C., 119.

EQUITY.

1. The appearance of a defendant to a bill in equity confers jurisdiction, unless it be for the sole purpose of setting up the want of jurisdiction: *Merrill v. Houghton*, 51 N. H., 61.

2. Therefore, if the party appear and make this objection, and at the same time demur to the bill for want of equity, the defect of jurisdiction is cured: *Ib.*, 61.

3. A bill in equity, brought to redeem stocks pledged to the defendants, may be sustained, although they may have sold the stocks; and in case it be out of their power to return the stocks, the court may, in a proper case, decree compensation: *Ib.*, 61.

4. A fraud, which will require the interposition of a court of equity, must be such as to have deprived the injured party of the opportunity to avail himself of his rights in a court of law; and it must be an independent fraud, unmixed with any fault or negligence of the party seeking relief: *Lyme v. Allen*, *Ib.*, 243.

5. A court of equity will not grant an injunction or a new trial by way of relief against a judgment at law obtained by fraud, in a case where the party seeking relief has an adequate remedy by application to the court in which the fraud was perpetrated: *Ib.*, 243.

6. A bill in equity alleged that the plaintiffs were entitled to a legacy by virtue of a decree of the court of probate upon the solemn probate of a will; that the heirs at law of the testator duly appealed from said decree, and duly prosecuted such appeal for a certain time, until the said heirs, the executors, and other legatees entered into a corrupt and fraudulent agreement to appropriate the entire estate of the testator to

their own use, and to defraud the plaintiffs of their legacy; that by virtue of this agreement the previous decree of the probate court was reversed, and by a subsequent decree the will was disapproved and disallowed. The bill prayed that the latter decree of the probate court be vacated unless the defendants, or some of them, should pay to the plaintiffs the amount of their legacy under the will. The bill did not allege that the plaintiffs had no notice of the appeal, nor of the adjustment of the controversy denominated a "corrupt and fraudulent agreement." The circumstances and particulars of the alleged fraud were not disclosed by the bill:

Upon demurrer, *Held*, that the plaintiffs were not entitled to the relief sought by the bill: *Ib.*, 273.

7. Where a party has suffered judgment to go against him in a suit at law when he had a valid defence, a court of equity will, as a general rule, refuse to relieve him: *Robinson v. Wheeler, Ib.*, 384.

8. If a discovery is needed to enable him to establish his defense, he will be required, ordinarily, to seek it while the suit at law is pending, or equity will not relieve him: *Ib.*, 384.

9. If any fact is disclosed that clearly shows it to be contrary to equity and good conscience to execute a judgment obtained at law, and the party could not avail himself of it as a defense, or was prevented doing it by accident or the fraud of the other party, unmixed with any fault or negligence of himself or his agents, he may apply to equity for relief: *Ib.*, 384.

10. But if his defense at law fails because he could not be a witness for the reason that the other party is an administrator, his bill in equity not disclosing any new and decisive evidence, but merely seeking a new trial, the bill will be held bad on demurrer: *Ib.*, 384.

11. A demurrer to a bill in equity admits the truth of the facts stated in the bill, so far as they are relevant and are well pleaded; but it does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill: *Craft v. Thompson, Ib.*, 536.

12. A general award can not be impeached collaterally, or by evidence *aliunde*, in the absence of fraud or misbehavior by the referees, unless, having undertaken to decide strictly according to the rules of law, they have mistaken the law; or, in regard to matters of fact, a material mistake is apparent upon the face of the award, or else a suggestion by the referees themselves of a mistake of fact, not apparent upon the face of the award, but still in their own view material to its validity,—in which cases, although the mistake suggested by the referees is made out only by extrinsic evidence, courts of equity will grant relief: *Ib.*

13. Undue bias or partiality on the part of the arbitrators is equivalent to fraud and misbehavior, for the purpose of impeaching their award: *Ib.*

14. A court of equity will not interfere in behalf of a party whose defeat in a submission before arbitrators is in any essential degree attributable to his own negligence. But any fact which clearly proves it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction: *Ib.*

15. A court of equity will set aside an award obtained by the perjury of a party to the submission: *Ib.*

16. A demurrer to a bill in which such perjury is distinctly and specifically alleged, is, for the purposes required by the demurrer, equivalent to the party's own confession of the crime, or to competent evidence of his legal conviction thereof: *Ib.*

17. As a general rule (to which this case forms no exception), where a demurrer is general to the whole bill, and there is any part of the bill which the defendant should be required to answer, the demurrer, being entire, must be overruled: *Ib.*

ESTOPPEL.

1. If the owner of goods, to prevent them from being attached as his own, represent that they belong to another, and the party to whom the representation is made, relying, and from the circumstances having reason to rely, on the representation as true, attach the goods for a debt due from the party, to whom it was represented that the goods belonged, in trover for attaching the goods, the owner will not be permitted to show that his representation was false, though at the time when he made it he had no notice of the debt on which the goods were attached, and had no intention to deceive the party who attached them: *Horn v. Cole*, 51 N. H., 287.

2. If a party claiming the right to the use of a well situated upon premises about to be conveyed by deed, being present at the execution of the deed and understanding its contents, signs the same as a witness thereto, and does not disclose to the purchaser, the fact that he had any claim to the use of the well, and if the purchaser, being ignorant of the party's claim, would not have purchased if he had known thereof, the party will not be permitted, in an action against the purchaser, to set up his claim to the use of the well, even though his omission to disclose the same was only an act of gross negligence, and not of bad faith: *Stevens v. Dennett*, *Ib.*, 329.

3. The distinction between an equitable and a legal estoppel by matter in pais commented upon: *Ib.*, 329.

EVIDENCE.

1. The contents of a writing, which if it ever existed, has been lost or destroyed and which can not be found after diligent search, may be proved by parol: *Smith & Melton v. N. C. R. R. Co.*, 68 N. C., 107.

2. What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act is admissible as a part of the *res geste*. But is his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal: *Ib.*

3. The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, can not be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company: *Ib.*

4. To establish the weight of nineteen bales of cotton burned on defendant's railroad, it is competent for a witness to state the average weight of the lot of thirty-three bales, of which the burned bales were a portion, and thus fix the weight of the nineteen bales by approximation: *Ib.*

5. There is an exception to the general rule against hearsay evidence, by which a matter of general interest to a considerable class of the public, may be proved by reputation among that class: Therefore, It is competent for a witness to state the price of cotton, from information received through commercial circulars, prices current and correspondence and telegrams from his factor: *Ib.*

6. The by-laws of a corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them: *Ib.*

7. To show that a person to whom a deed has been made conveying property in trust did not accept the trust, a declaration not under seal, but signed by him, nine years after the deed, making known to all whom the matter concerned, "that immediately on his receiving notice of the conveyance, he did positively refuse to accept or to act under the trust intended to be created, and that he had at no time since ac-

cepted the trust or acted in any wise as trustee in relation to it," is proper evidence, the party making the declaration being dead and his handwriting proved. *Armstrong v. Morrill*, 14 Wallace, 120.

8. Courts may take judicial notice of the fact that, by the common consent of mankind, certain rules of navigation, fixing the number, color, position, power, etc., of lights to be used at sea by night, on steamers and sailing vessels respectively, so as the better to guard against collision by establishing a uniform rule on the subject, have been acquiesced in, as of general obligation: *The Scotia*, 14 Wallace, 170.

9. A statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another and original statement contained in a book—itself destroyed in the fire—accompanied by proof that on a certain day the witnesses took a correct inventory of the merchandise, and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what is offered is a correct copy, may, on a suit against insurers, be received in evidence to fix the value of the merchandise burnt, even though there be no independent recollection by the witnesses affirming to the correctness of the original statement of what they found the value of the merchandise to be: *Insurance Companies v. Weides*, *Ib.*, 375.

10. The result of an undertaking is sometimes a safe criterion by which to judge of an act which caused it: *The Steamer Webb*, *Ib.*, 406.

11. A plaintiff in ejectment, claiming under a deed made on a sale in a foreclosure of a mortgage, may properly put in evidence the record of the proceedings in foreclosure, even though the defendant claim by a deed absolute made by the mortgagor, prior to giving the mortgage under which the foreclosure took place: *Dirt v. Morris*, *Ib.*, 484.

12. On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership. It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made: *Philpot v. Gruninger*, *Ib.*, 570.

13. Subscribing witnesses to a will are allowed to give their opinions as to the soundness of mind of the testator when the will was executed; but this rule does not apply to other instruments, especially to those which do not require subscribing witnesses: *Jeter v. Tucker*, 1 S. C., 245,

EXECUTOR.

1. Among other things a testator wills: "My executors are fully empowered to sell the balance of my estate or any part of it they may think best for the interest of my family, or retain the balance after paying my just debts, should they think it more to the interest and welfare of my family. I desire, in either case, the property or proceeds shall be kept together until the oldest child shall arrive at a lawful age or shall marry, then the whole of my estate shall be divided between my wife and children. I desire further, that my wife shall have at all times sufficient funds for the maintenance and education of my children, of principal, if the interest should not be sufficient for that purpose."

Held, That the discretion as to amount of the expenditure beyond the income, or of the extent of the encroachment to be made upon the principal, must be exercised by the executor: *Jane C. Hinton v. David Hinton*, 68 N. C., 99.

2. The general rule is, that where a discretion is given to a trustee, the Court has no jurisdiction to control its exercise, if the conduct of the trustee be *bona fide*. If, however, the trustee acts *mala fide*, or refuses to exercise the discretion, the court is obliged, from necessity, to interfere and take upon itself the discretionary power: *Ib.*

FALSE REPRESENTATIONS.

A Court of Equity will not lend its aid to set aside a contract on the ground of fraud, unless the party seeking relief has been misled to his prejudice or injury. Courts of Equity do not, any more than Courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscious acts, which are followed by no loss or damage: *Rogers v. Higgins* 57 Ill., 244.

FORFEITURE.

Where a forfeiture is made absolute by statute, a degree of condemnation relates back to the time of the commission of the wrongful acts, and takes effect from that time, and not from the date of the decree: *Henderson's Distilled Spirits*, 14 Wallace, 44.

FRAUDS, STATUTE OF.

1. The plaintiff sold the furniture in his hotel, and his stable stock at the same auction, and all upon the same terms and condition; and the defendant purchased a large number of separate articles, upon as many separate bids, and at separate and distinct prices, many of which were less than \$33.00. This was regarded as an entire contract for the whole of the property thus purchased by the defendant at the aggregate price, and will thus be within the statute of frauds, if the aggregate price exceeds \$33.00: *Jenness v. Wendell*, 51 N. H., 63.

2. In such case, a delivery and acceptance of a part of the goods will take the entire contract out from the operation of the statute of frauds: *Ib.*, 63.

3. And it would make no difference whether the sale was completed in one day, or extended through two or more days: *Ib.*, 63.

4. Where the terms of the sale are "cash on delivery," the vendor may hold a lien upon the property until the price is paid, if he chooses; or he may waive the payment and relinquish the lien, in which case, the title to the property will vest in the purchaser from the time of the sale: *Ib.*, 63.

5. Where the contract is for an article coming under the general denomination of goods, wares or merchandise, the quantity required and the price being agreed upon, it is a contract of sale within the statute of frauds, although the subject matter, at the time of making the contract, does not exist in goods, but is to be converted into that state subsequently by the maker and vendor; but if what is contemplated by the agreement is the peculiar skill, labor or care of the maker, then the contract is one for work and labor, and not within the statute: *Presscott v. Locke*, *Ib.*, 94.

6. An article is sold at the risk of the buyer as soon as the contract of sale is perfected. If the sale is of things which consist in quantity, and which are sold by number, weight or measure, the sale is not perfect until the thing bargained for is counted, weighed or measured, for until that time it is not apparent which are the goods that make the object of the sale; but the contract relates only to an object which is indeterminate, and which can be determined only by the measuring, weighing, or counting, and the risk can not fall but upon some determinate thing: *Ib.*, 94.

7. This rule holds, not only when the sale is of a certain quantity to be taken from a larger bulk, but also when the sale is of the entire quantity, provided it is made at the rate of so much the pound, measure or number; for the price being constituted only for each pound which shall be weighed, or for each number, (as each hundred or thousand) which shall be measured, is not determined before the weighing or measuring: *Ib.*, 94.

8. Both the delivery and the acceptance of the thing sold must be unequivocal in order to satisfy the requirements of the statute of frauds, and place the thing sold at the risk of the buyer: *Ib.*, 94.

9. To constitute delivery so that the property bargained for will pass, nothing must remain to be done concerning it by either party: *Ib.*, 94.

GUARDIAN AND WARD.

1. When a guardian makes no effort to invest his ward's money at a profit, but uses it in his own business, he converts it, and is liable for its value at the time of the conversion. And having received Confederate money and bank notes, he is liable for the value of the same at the date of receipt, the former to be ascertained by the scale, and that of the latter upon evidence: *Winstead et ux. v. Stanfield, guardian, et al.*, 68 N. C., 40.

2. The conversion by a guardian to his own use, of bonds or notes belonging to his ward, renders him liable for their actual value, not the value expressed on the face of the same: *Ib.*

3. Upon the marriage of a *feme* ward, compound interest ceases, and she has no right to demand the same in a settlement with her guardian: *Ib.*

4. It is not necessary to show actual fraud in order to invalidate a release given by a ward to his guardian shortly after the arrival of the former at age: *Womack v. Austin*, 1 S. C., 421.

INJUNCTION.

The proceeding by the court on the dissolution of an injunction upon the party claiming damages by reason of such injunction suggesting in writing the nature and amount thereof, to hear evidence and assess the damages, is not a new proceeding, but, follows as a part of the original proceeding, upon the dismissal of the bill and dissolution of the injunction; and if either party desire a continuance, he should show grounds for it in the usual mode, by affidavit: *Holmes v. Steteler et al.*, 57 Ill., 209.

INSURANCE.

1. Insurance may be effected in the name of a nominal partnership, where the business is carried on by and for the use of one of the partners: *Phoenix Insurance Co. v. Hamilton*, 14 Wallace, 504.

2. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy: *Ib.*

3. And where the firm has no actual care or custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance; the omission to inform the company of an agreement of dissolution previously made can not be considered a concealment which will avoid the policy: *Ib.*

4. Parol evidence is admissible to explain a receipt, given by an agent of an Insurance Company, for the premium on a policy of insurance against loss or damage from fire: *Ferebee v. N. C. Mutual Home Ins. Co.*, 68 N. C., 11.

5. An Insurance Company is not bound by any private arrangement entered into by their agent, acting without the knowledge or authority of the company, in respect to the payment of the premium on a policy of insurance. Especially is this so, when the company, instead of affirming the action of the agent, gives notice to the assured to 'pay his note when due, and save his policy: *Ib.*

6. Although an Insurance Company may waive the right to declare a policy void, for the reason that a note given for cash premium is not paid at maturity; still, such waiver does not preclude the company from insisting upon a condition contained in the policy, declaring it void in case of loss or damage by fire, if the note so given, or any part thereof, shall remain unpaid and past due at the time of such loss or damage: *Ib.*

7. The insurer is bound fairly to apprise the assured of any defect in his preliminary proof on which he intends to insist, so that the assured may know what is essential to a due presentation of his claim, and waiver may be inferred where the objection to such proof is in general terms: *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C., 24.

INTERNAL REVENUE.

1. A removal of distilled spirits from the place where distilled to a bonded warehouse of the United States, if made with intent to defraud the United States of the tax due on the spirits, is illegal, and, though the intent was never executed, the spirits removed are subject to forfeiture: *Henderson's Distilled Spirits*, 14 Wallace, 44.

2. The fifth section of the act of July 14, 1870, by which the power of collectors of internal revenue to post-stamp certain instruments of writing, and remit penalties for the non-stamping of them when issued, is extended in point of time, applies to notes issued before the passage of the act as well as to notes issued subsequently: *Pugh v. McCormick*, *Ib.*, 361.

3. The "distillery warehouses" which distillers are required by the 15th section of the same act to provide, situated on their distillery premises, are "bonded warehouses," within the meaning of the joint resolution of Congress of March 29, 1869, which declares that the proprietors of all "internal revenue bonded warehouses" shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them: *United States v. Powell*, *Ib.*, 493.

4. These expenses properly include *per diem* wages paid to storekeepers for taking charge of them on Sundays: *Ib.*

JUDGMENT.

Satisfaction of the judgment recovered in an action of trespass for the conversion of chattels, passes property in such chattels to the defendant; and the defendant's title thus acquired takes effect by relation from the time of the conversion: *Smith v. Smith*, 51 N. H., 571.

JURISDICTION.

1. The Supreme Court of the United States has Jurisdiction of appeals from the highest State courts, under the 25th section of the Judiciary Act, only in a limited number of cases, and this court, in a pointed way, calls the attention of the bar generally to the fact that much expense would be saved to suitors, if before they advised them to appeal from decisions of these courts to this one, they would see that the case was one of which this court had cognizance under this section: *Hurley v. Street*, 14 Wallace, 85.

2. The Supreme Court of the United States has not jurisdiction under the 25th section of the Judiciary Act, unless it can be seen, from the record, that a State court decided the question relied on to give this court jurisdiction: *Cockroft v. Voe*, *Ib.*, 5.

3. Nor under that section, when the decision of the State Court is made on precedents of general jurisprudence of this court or one of its own similar pre-existent rules; notwithstanding (in the latter case), that the State have subsequently made the rule one of the articles of its constitution: *Coperton v. Bowyer*, 216; *Tennessee Bank v. Bank of La.*, 9; *Palmer v. Marston*, 10; *Senior v. Heistall*, 14 Wallace, 13.

4. Nor under that section, if the judgment of the State court may have been given on grounds which the section does not make cause for error, as well as upon some ground which it does so make: *Steine's v. Franklin County*, 15; *Kennedock B. R. v. Portland B. R.*, 14 Wallace, 23.

5. Nor (when the State Court is composed of a Chief Justice and associates) unless the writ be allowed by the Chief Justice himself: *Bartemeyer v. Iowa*, 14 Wallace 28.

6. Verbal agreement between A. and B., whereby A. agreed to make advances to B. in money, provisions, etc., to enable the latter to carry on a turpentine farm; and B. agreed to deliver to A. the products of the farm, to be by him sent to market, sold, and the proceeds applied to refund the advances. A. made advances under the agreement, and B. in denial of, and in fraud of A's rights, shipped products of the farm to market.

Held, That A could not maintain a bill in equity against B. for discovery, specific performance of the agreement, or injunction: *Hall v Joiner, et al.*, 1 S. C., 186.

7. The former remedial jurisdiction of equity, which arose out of the necessity for discovery, was superseded by the Act making parties competent witnesses: *Ib.*

8. It is a consequence of the act which excludes courts of equity from jurisdiction, where there is plain and adequate remedy at law, that where a new remedy is conferred at law, it operates to destroy the pre-existing jurisdiction in equity assumed for want of such legal remedy: *Ib.*

LEGAL TENDER.

A decree ordering payment in coin of a debt contracted before the passage of the Legal Tender Acts reversed, on the authority of the *Legal Tender Cases*, (12 Wallace, 475) *Bigler v. Waller*, 14 Wallace, 298.

LIEN IN ADMIRALTY.

1. While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defense: *The Key City*, 14 Wallace, 653.

2. No arbitrary or fixed period of time has been, or will be established, as an inflexible rule, but the delay which will defeat such a suit, must, in every case, depend on the peculiar equitable circumstances of that case: *Ib.*

LOUISIANA.

Inchoate rights to land in the territory of, such as some made A. D. 1789 were of imperfect obligation on the United States, when succeeding A. D. 1803, to the ownership of the region. Their nature and obligation stated: *Dent v. Emmeger*, 14 Wallace, 308.

MORTGAGE.

1 A mortgagee claiming, under a proceeding which purported to be a foreclosure, but which was a void proceeding, is not liable for rents and profits unless he have actually received them: *Bigler v. Waller*, 14 Wallace, 297.

2. To redeem property which has been sold under a mortgage, as is alleged, irregularly, the whole mortgage money must be tendered, or if suit brought, be paid into court: *Collins v. Riggs, Ib.*, 491.

3. Where, on a mortgage of a stock of goods in a country store, it was agreed, verbally, that the mortgagor should continue in possession of the store and goods, and sell the goods as before for his own benefit, and he did so, it was

Held, That such an arrangement was inconsistent with the avowed object of the mortgage, and rendered it fraudulent and void as to the mortgagor's creditors: *Putnam v. Osgood*, 51 N. H., 192.

MOTION FOR RE-HEARING.

In an equity suit, the granting or refusing to grant by the highest court of the State, not a subject for review by the Supreme Court of the United States: *Scine v. Franklin County*, 14 Wallace, 15.

MUNICIPAL CORPORATIONS.

The authorities of towns and cities have ample power to lay out, open, grade, re-grade, level, and pave or gravel streets and alleys, and to establish drains and sewers, culverts and embankments, whenever they are necessary for the improvement of such streets and alleys, and where the work is done with proper care and skill, and without malice, the town or city will not be liable for any consequential damages that may result therefrom: *City of Delphi v. Evans*, 36 Ind., 90.

NATIONAL BANKS.

1. May be sued in any State, county, or municipal court in the county or city where located, having jurisdiction in similar cases: *Bank of Bethel v. Pukquoque Bank*, 14 Wallace, 383.

2. Do not lose corporate existence by mere default in paying circulating notes, and upon the mere appointment of a receiver: *Ib.*

3. May be sued though a receiver has been appointed and is acting: *Ib.*

4. The decision of the receiver against the validity of a claim presented to him for a dividend is not final; the creditor may proceed afterwards to have it judicially adjudicated in a suit in a proper State Court, against the bank: *Ib.*

NOTE.

A negotiable note, payable on demand, was indorsed thirteen months after it was given,—the consideration for the indorsement being an agreement to support the payee. In an action by the indorsee against the maker, it was

Held, that the maker might set off a debt due to him from the payee at the date of the indorsement: *Cross v. Brown*, 51 N. H., 486.

NUISANCE.

The discretion resting in the court as to ordering the abatement of a private nuisance is a legal discretion, to be exercised affirmatively whenever the interests or happiness of individuals or the community may require it: *Maxwell v. Boyne*, 36 Ind. 120.

PAROL.

1. When the contents of a writing come collaterally in question, such writing need not be produced, but parol evidence as to its contents will be received: *Pollock v. Wilcox, et al.*, 68 N. C., 46.

2. Where two notes, a part of the consideration in the purchase of a tract of land, had been destroyed by the payer after a settlement, in the usual course of business:

Held, that such need not be produced on a trial, impeaching the consideration of the deed for fraud, and that parol testimony of their contents was properly allowed. *Quære*, as to the admissibility of the evidence, if the notes had not been lost? *Ib.*

PARTIES.

1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor: *Hook v. Payne*, 14 Wallace, 252.

2. If such persons do not appear before the master, no decree can be made for or against them, because they would not be bound thereby: *Ib.*

PATENTS.

1. The ancient mode of annulling or repealing the king's patent was by *scire facias*, generally brought in the Chancery where the record of the instrument was found: *Mowry v. Whitney*, 14 Wallace, 434.

2. In modern times the Court of Chancery, sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered. But *sci. fa.* could only be sued out in the English courts by the King or his Attorney-General, except in cases where two patents had been granted for the same thing to different individuals, and the 16th section of the Act of July 4th, 1836, concerning patents for inventions, is based upon analogous principles. Both upon this authority and upon sound principle, no suit can be brought to set aside, annul, or declare void, a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government, or by the authority or permission of the Attorney-General, so as to be under his control: *Ib.*

PUBLIC CORPORATIONS.

1. The records of a public corporation are admissible in evidence generally. Their acts are of a public character, and the public are bound by them: *Weith et al. v. City of Wilmington*, 24 N. C., 68.

2. The corporate powers of cities and towns are emanations from the State, granted for purposes of convenience, and they are not allowed in the exercise of those powers to contravene the policy of the State, or exceed the powers conferred, and much less those which are either expressly or impliedly prohibited: *Ib.*

3. *Therefore*, Where the city of W. in 1862, borrowed money from A. and gave him a bond, which money was used indirectly in aid of the rebellion, and A., before the bond became due, transferred it to B. without notice as to its consideration, and the city in 1867, by virtue of an Act of Assembly, took up the bond, and issued to B. in its place other bonds with coupons attached, who afterwards sells the coupon bonds in open market, for a fair price, and without any notice as to the illegality of the original consideration, to C. In a suit by C. against the city, to recover the coupons on the bonds purchased from B., it was

Held, That C. could not recover, for the reason that all bonds of a like nature had been declared void by the ordinance of the Convention of 1865, and the payment of the same was thereby, and by sec. 13, art. 7, of the Constitution, prohibited, and as being against public policy: *Ib.*

4. Bonds issued by municipal corporations, under their corporate seal, payable to bearer, are negotiable, and are protected in the hands of the rightful owner by the usages of commerce, which are a part of the common law: *Ib.*

PURCHASER WITHOUT NOTICE.

A person purchasing for value in one State under a will probated in it, on a surrogate's order of another State where the decedent died, admitting the will to probate there, will be protected in his purchase against heirs-at-law, though after the purchase the surrogate's order has been reversed by the highest court of the State where the order was made, and the supposed will declared null; the reversal having been made after the sale and after the devisee in the will had sold out all his interest under it to the heirs-at-law, and the purchaser from the devisee not having been made a party to the proceedings setting the surrogate's order aside: *Foulke v. Zimmerman*, 14 Wallace, 113.

RAILROAD.

1. The statutes in force from 1849 to 1851, providing for the assessment of the damages of a land-owner whose land was crossed by a railroad, did not authorize the assessors to include the damage which was or might be occasioned to such land-owner by the construction of the railroad over the land of other persons: *Eaton v. B. C. & M. R. R.*, 51 N. H., 504.

2. A railroad corporation, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stones thereon:

Held, that this was a taking of E.'s property, within the meaning of the Constitutional prohibition; and that the Legislature could not authorize the infliction of such an injury without making provision for compensation: *Ib.*, 504.

3. A railroad corporation constructed their road across the farm of E. Damages were assessed under the statute, and paid to E. E. released the corporation from damages on account of the laying out of the road over his land. Northerly of E.'s farm there was a ridge of land completely protecting the farm from the effects of floods and freshets in a neighboring river. Through this ridge, the corporation, in constructing their road, made a deep cut, through which the waters of the river in floods and freshets sometimes flowed, carrying, on one occasion, sand, gravel, and stones upon E.'s farm:

Held, that if even the corporation had constructed their road at said cut with due care and prudence, E. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of E.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage E.'s land: *Ib.*, 504.

RES ADJUDICATA.

The principle of *res adjudicata* embraces not only what has actually been determined in a former case, but also extends to any other matter properly involved, and which might have been raised and determined in it: *Rogers v. Higgins*, 57 Ill., 244.

RESCISSION OF CONTRACTS IN EQUITY.

1. Mental imbecility alone will not authorize a court of equity to set aside an executed contract, the mental weakness of the party not amounting to an incapacity to comprehend the contract, and there being no evidence of imposition or undue influence: *Rogers v. Higgins*, 57 Ill., 244.

2. Solicitation, importunity, argument and persuasion to induce the party to enter into a contract, would not of themselves affect the validity of a deed: *Ib.*

3. Where a party seeks to rescind a contract for fraud, he must ask the aid of the court in a reasonable time: *Ib.*

STAMPS.

Not required to an indorsement of a promissory note, nor to a waiver in writing, by an indorser, of demand and notice: *Pugh v. McCormick*, 14 Wallace, 381.

TAX.

1. Under the statute of 1869, ch. 4, all the deposits and accumulations in the several savings banks in this State, however such deposits and accumulations may be in-

vested, are to be taxed to the banks; and such taxes are to be paid to the State, in the first instance. And such deposits, &c., are not liable to any other tax: *Rockingham Ten Cent Savings Bank v. Portsmouth*, 52 N. H., 17.

2. Real estate owned by a savings bank, and purchased with the deposits and accumulations of the bank, is not, under said statute, subject to taxation as real estate in the place where the same is located: *Ib.*

3. A fundamental principle in taxation is, that the same property shall not be subject to a double tax payable by the same party: *Ib.*

4. Thus, when it is decided that a certain class or kind of property is liable to be taxed under one provision of the statute, it follows, as a legal conclusion, that the Legislature could not have intended that the same property should be subject to another tax: *Ib.*

5. This court has no jurisdiction by bill in equity to restrain a town or the collector thereof from the collection of a tax which is illegally assessed, as the party has a plain and adequate remedy at law: *Ib.*

6. An application for abatement is the proper remedy in such cases, not only when the assessment is made upon an over valuation, but also when the whole assessment is illegal: *Ib.*

7. A bill in equity, one of the prayers in which (with others) is that the court will abate the tax, may be considered and treated as a simple application for abatement, if the necessary preliminary steps have been taken: *Ib.*

TENANTS IN COMMON.

Where A. enters into an agreement with B. to save from a wrecked vessel as much of the cargo as could be saved, and B. agrees to allow him, A., for his services, such a *per cent.* of the property saved, as compensation; and, in pursuance of such agreement, A. recovers from the wreck a portion of the cargo and lands it on the beach in a place of safety:

Held, that A. and B. are tenants in common of the property so saved, and that the undivided share of A. is liable to be seized by the Sheriff under a warrant of attachment: *Boylston Ins. Co. of Boston et al. v. Davis*, 68 N. C., 17.

TRUSTEE.

1. A written order by a creditor upon his debtor, requesting him to pay to a third person, is an equitable assignment of a chose in action, which a court of law (the debtor having received notice of the assignment) will recognize and enforce: *Conway v. Cutting*, 51 N. H., 407.

2. No particular form of words is essential to the validity of such an assignment; neither is the express assent of the debtor thereto required in order to establish his liability to pay the debt of the assignee: *Ib.*, 407.

3. It is not necessary, in case of the assignment of a debt, that the debt should be due at the time of the assignment in order to protect the rights of the assignee from an attachment against the assignor: *Garland v. Harrington*, *Ib.*, 409.

4. A debt afterward to accrue may be effectually assigned, provided at the date of the assignment there be an existing contract out of which the debt is to grow: *Ib.*, 409.

5. No formal assent by the debtor, having notice of such assignment, is essential to the validity and protection of the rights of the assignee: *Ib.*, 409.

TRUST FUNDS.

1. The bonds of a railroad corporation are personal securities, in contradistinction to public or real securities, and can only be upheld as proper subjects for the investment of trust funds, under special circumstances, which ought to be made to appear by the trustee: *Allen v. Gaillard*, 1 S. C., 279.

2. That the bonds in question were sought after, at the time the investments were made, by prudent and sagacious men; that no investment at that time was regarded as more safe or judicious; that they bore 7 per cent. interest, payable semi-annually, and were a favorite investment with capitalists; that their coupons were taken by the merchants as so much money; that the guardian acted in entire good faith, and purchased at the same time other bonds of the same kind for himself; and that \$300,000 or \$400,000 of them were held by citizens of the district:

Held, not to justify the investments: *Ib.*

3. When the instrument creating the trust directs in what kind of property the funds shall be invested, the trustee will be liable for departing from the direction, unless it is done without fault on his part. Where there is no such direction, and the investment is made in securities of a class not disfavored by the court, then, if the trustee acts with prudence and honesty, he will not be liable if, from circumstances which he could not control, a loss should ensue: *Sanders v. Rogers*, 1 S. C., 452.

VENDOR AND VENDEE.

1. In an action for the breach of a covenant of seisin, the general rule, that the vendee recovers, as damages, the price paid for the land, with interest from the time of payment, is subject to many modifications, as where his (the vendee's) loss, in perfecting the title, has been less than the purchase money and interest, he can only recover for the actual injury sustained: *Farmers' Bank of North Carolina v. Glenn et ux.*, 68 N. C., 35.

2. And if, after the sale to the vendee, the vendor perfects the title, such subsequently acquired title enures to the vendee by estoppel; which, being a part of the title, may be given in evidence without being specially pleaded: *Ib.*

WAIVER.

1. Where the insured, within the time limited, furnished the agent of the insured with the preliminary proofs of the loss, and they were received without objection to their sufficiency, and objections to the payment of the loss were afterward put upon other grounds:

Held, that the defects in the proofs must be regarded as waived: *Taylor v. Ins. Co.*, 51, N. H., 50.

2. *Held*, also, that the waiver would extend to the case where, instead of the certificate of the nearest magistrate, as the rules required, a certificate of a reputable citizen, not a magistrate, was received and assented to by the agent of the insurer as sufficient: *Ib.*, 50.

WILL.

A direction in a will to divide an estate real and personal, is not a direction to sell the real estate for a division; hence the words, "The rest and residue of my estate, whether real or personal, I give to be divided between the legatees herein mentioned, in proportion," &c., confer no power on the administrator *cum testamento annexo* to sell such real estate for the purpose of a division: *McDowell, admr.*, v. *White*, 68 N. C., 65.

WITNESS.

1. Under our statutes neither interest nor infamy is any disqualification as a witness, whether as a party or otherwise: *Clements v. Marston*, 52 N. H., 31.

2. Nor are those disqualifications any longer operative, which, being founded upon grounds of public policy, such as the fear of producing dissensions and strife in families and encouraging perjury, were held at common law sufficient to exclude husbands and wives from testifying for or against each other in all cases: *Ib.*

3. Instead, therefore, of the common law rule that the wife could not testify for or against her husband, and *vice versa*, for the double reason that their interests were

identical, and that it was also contrary to sound public policy, the rule in this State now is that husband and wife may elect and be compelled to testify for or against each other in all cases where the court can see that their examination as witnesses upon the points to which their testimony is offered will not lead to a violation of marital confidence; *Ib.*

4 Therefore, when one party to a suit is an executor or administrator, and does not elect to testify, although the other party is thus precluded from being a witness, yet his wife may be called as a witness, either for or against her husband, where no violation of marital confidence is involved: *Ib.*

5. Conversations between the husband and third persons, and which were heard by the wife, would not ordinarily come within this exception; *Ib.*

6. And when the wife acted as the agent of the husband, in a matter requiring no special confidence, and where no such confidence is bestowed, and where any other person could have acted just as well, she may ordinarily state any facts learned in course of such agency: *Ib.*

DIGEST OF RECENT DECISIONS.

[Digest of recent decisions of the Supreme Courts of Alabama (January Term, 1873), Iowa (December, 1872), Pennsylvania (March, 1873), Tennessee (April and September Terms, 1872, at Jackson and Knoxville), and of the Supreme Court of the United States (December Term, 1872); United States Circuit Court Northern District of Illinois (February, 1873), United States Circuit Court Western District of Michigan (March, 1873), and United States Circuit Court Eastern District of Missouri (March, 1873).]

ACTION TO RECOVER MONEY PAID FOR TAX.

Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue taxes illegally exacted, or where an appeal in such a case was duly taken, before making the payment, to the commissioner, without success; and if commenced in the State court the action may be removed on petition of the defendant into the circuit court for the district where the service was made, and in that state of the case the jurisdiction of the circuit court is clear beyond doubt, irrespective of the citizenship of the parties, as it is made so by the express words of an act of Congress: *Williams v. Reynolds*, United States Supreme Court, December Term, 1872.

ADMINISTRATION—Limitations, two and three years.

Where one party to a note resided in Tennessee, but assigned his interest to foreign partners before the death of the payor, and all the holders and their assignee in bankruptcy were non-residents:

Held, that by the statute three years was required to complete the bar: *Bailey v. Brooks*, Supreme Court of Tennessee, September, 1872.

AGENCY—War Redemption.

1. An agent bid off lands at sheriff's sale, and return was made that the land was sold to H. C., agent of the plaintiff. The war intervening, the debtor tendered the redemption money to H. C., who refused to receive it:

Held, that, the purchase was by H. C.; that if this was not so, his principals were bound by the vendor: *Darling v. Lewis*, Supreme Court of Tennessee, September, 1872.

2. A. directed B., her son, to pay C. \$5,000, then in B.'s hands, in part satisfaction of A.'s debt to C. B. wrote to C. for instructions, and pursuant to instruction, remitted to C. \$3,000. C. directed him to let D. have the remainder on his giving personal security and a deed of trust on certain lands. B. let D. have the money without the deed of trust:

Held, that A. was entitled to a credit for the \$2,000: *Williams v. Williams*, Supreme Court of Tennessee, September, 1872.

ALIENS.

1. Aliens domiciled in the United States in 1862, were engaged in manufacturing saltpetre in Alabama, and in selling that article to the Confederate States, knowing that it was to be used by them in the manufacture of gunpowder for the prosecution of the war of the rebellion:

Held, that they thus gave aid and comfort to the rebellion: *Curtis et al. v. United States*, Supreme Court of United States, December Term, 1872.

2. The doctrine of *Hanauer v. Doane*, reported in 12th Wallace, that "he who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof," repeated and reaffirmed: *Ib.*

3. Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States; they are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion: *Ib.*

4. The proclamation of the President of the United States, dated December 25th, 1868, granting "unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof," includes aliens domiciled in the country who gave aid and comfort to the rebellion: *Ib.*

5. The pardon and amnesty thus granted relieve claimants prosecuting in the Court of Claims for the proceeds of captured and abandoned property, under the act of Congress of March 12th, 1863, from the consequences of participation in the rebellion, and the necessity of establishing their loyalty in order to prosecute their claims, which would otherwise be indispensable to a recovery: *Ib.*

6. By the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States a right to prosecute claims against that government in its courts, and therefore British subjects, if otherwise entitled, may, under the act of Congress of July 27th, 1863, prosecute claims against the United States in the Court of Claims: *Ib.*

ARBITRAMENT AND AWARD.

A reference to two, with power to choose a third referee, the decision of the referees to be final requires the concurrence of the three to make an award: *M. & C. R. R. Co. v. Pillow*, Supreme Court of Tennessee, April, 1872.

ATTACHMENT—Bankruptcy Practice.

Attachment bill filed against a debtor who had conveyed property in trust, alleging that the conveyance was void as in fraud of creditors. Trustees replevied. Debtor became bankrupt and pleaded his bankruptcy pending the suit. Court refused to render any personal judgment against the bankrupt, but gave judgment against the trustee for the return of the property or payment of so much of its value as would pay complainant's debt:

Held, right: *Nelson v. Eifler*, Supreme Court of Tennessee, September, 1872.

ATTACHMENT—REPLEVY BOND.

A replevy bond which does not recite any levy on property, nor make any reference to the property, is good where it ascertains the suit, the amount to be paid, and the event in which the payment is to be made. Code, 773, 774: *Stephens v. Greene County Iron Works*, Supreme Court of Tennessee, Sept., 1872.

ATTORNEY AND COUNSEL.

The appearance of an attorney for a married woman, will be presumed to be upon lawful authority in a proceeding for sale of the lands of the wife on the joint petition of husband and wife: *Kindle v. Titus*, Supreme Court of Tennessee, April, 1872.

BANKRUPTCY—Fraudulent.

A replication in a State court to a plea of bankruptcy, that it was obtained by fraudulent concealment of assets, is bad. The State Courts have no jurisdiction of the matter: *Morris v. Creed*, Supreme Court of Tennessee, Sept., 1872.

But a replication that the Court of the United States in Ohio, which discharged the bankrupt, had no jurisdiction, because he was a citizen of Tennessee, and so the discharge void is a good plea in a State Court: *Hennessey v. Mills*, Nashville, December 14, 1872.

BILLS AND NOTES—Order.

1. A. gave an order on B. for \$30.50, which was presented to B., who admitted an indebtedness of \$24, and increasing daily, agreeing, when it were up to the amount, to accept. A third party served a garnishment to reach the same debt. B. answered that he owed \$26.50, for which judgment was rendered. The holder of the order then sued B:

Held, not entitled to recover: *Delequere v. Munson*, Supreme Court of Tennessee Sept., 1872.

2. A statement of an account, part of which is not yet due, followed by the words, "Please pay the above amount to D. and C.," is an order, and not an assignment: *Ib.*

3. A presentation of an order for acceptance, with a promise by the payor to accept when the amount was increased to the sum named, and to notify others presenting orders, followed by a new presentation next day, when no acceptance was made, does not amount to evidence of acceptance: *Ib.*

BILLS OF EXCHANGE.

1. A bill of exchange drawn in this State, and payable at New Orleans, in the State of Louisiana, is a foreign bill of exchange, and it should be protested for non-payment, as required by the laws of Louisiana: *Todd v. Ward*, Supreme Court of Alabama, January term, 1873.

2. Under the general commercial law, the demand of payment on a foreign bill of exchange must be made by the notary himself. A certificate is insufficient which shows that such demand was made by the deputy of the notary, without proof of some local law allowing the deputy to act in lieu of the notary: *Baseman et al. v. Ivey et al.*, Supreme Court of Alabama, Jan. term, 1873.

BREACH OF TRUST.

1. If there be a clear breach of trust by a trustee, yet if the *cestui que trust* or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose: *Crosby v. Beale et al., admr.*, Supreme Court of the United States, Dec. term, 1872.

2. That whether the lapse of time is sufficient to bar a recovery, must depend upon the particular circumstances of each case: *Ib.*

CERTIORARI MERITS.

In a petition for *certiorari* by a Constable against whom a judgment is rendered for non-return of an execution, it is not sufficient merits to state that a proper return

was made on the *fi. fa.*, and that the same has been lost, without also showing that the paper was returned to the J. P. at the proper time and filed: *Venott v. Carter*, Supreme Court of Tennessee, Sept., 1872.

CHANCERY—Bill to Attach a Decree.—Notice before Decree.

Complainants filed a bill to set aside a decree of partition, on the ground that 100 acres of land belonging to one of complainants, had fraudulently been put into the petition as part of an estate in which said complainant, and his wife the other complainant, were interested in common with the defendants. The bill admitted that the fact of the land being included, was known to complainants when the land was surveyed and laid off for partition:

Held, that by failing to take steps before the final decree, the complainants were prescribed from attaching the decree: *Luttrell v. Fisher*, Supreme Court of Tennessee, Sept., 1872.

CHANCERY PLEADING.

A party against whom an estoppel is set up by bill, who, in his answer puts his defense upon a denial of his participation in a sale, without asserting the knowledge by the purchaser, of his title, can not be allowed to prove that knowledge in bar of the purchaser's claim: *Glenn v. Osborne*, Supreme Court of Tennessee, Sept., 1872.

CHANCERY PRACTICE—Relief in Alternative..

1. If parties in Chancery are entitled to recover either as heir or devisee, it is not material whether the will under which they claim is properly proved or not, they will have a decree: *Buck v. Williams*, Supreme Court of Tennessee, April, 1872.

2. It is not material that in the Chancery Court, the parties were required to elect whether they would claim as heirs or devisees, and elected to claim as devisee. They may have a decree without specifying whether as heirs or devisees: *Ib.*, 247.

CHANCERY SALE.

1. Where a bill is filed to administer an estate, and sell lands and negroes, to pay debts, and all of the parties having a present interest are made parties, the fact that infant remaindermen *in esse* are not noticed in the proceeding, will not vitiate the sale: *Armstrong v. Harris*, Supreme Court of Tennessee, April, 1872.

2. A sale under the act of 1827, ch. ——— Code, for payment of debts, whether made in Chancery or in the County Court, depends for its validity, upon the matters stated in the petition and decree:

3. In such a proceeding, a report and conformation is not an indispensable requisite, as it is an insolvent proceeding: *Kindle v. Titus*, Supreme Court of Tennessee, April, 1872.

4. In such a case, if the petition aver that the personalty is *insufficient* to pay the debts, and the petitioners are satisfied that hereafter it will become necessary for the purpose of paying debts and making distribution, to sell the land, and the decree state that the matters stated in the petition appear to be true, the sale can not be supported as a sale under the act of 1827: *Ib.*

5. A sale for partition of realty, made prior to the act of 1854, ch. ——— sec. — which includes a present estate of the petitioners with a remainder after a dower, is void as to the dower, so far as it disposes of the interest of persons not *sub jure*: *Ib.*

See ATTORNEY AND COUNSEL.

COMMON CARRIERS.

1. Common carriers are not chargeable, in cases free from suspicion, with notice of the contents of packages carried by them; nor are they authorized in such cases

to require information as to the contents of the packages offered as a condition of carrying them: *John Furrott v. Barney et al.*, Supreme Court of United States, December Term, 1872.

2. Where there is nothing to excite the suspicion of a common carrier as to the contents of a package carried by him, it is not negligence on his part to introduce the package, when appearing to be damaged, into his place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination and handled: *Ib.*

3. The measure of care against accidents, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own: *Ib.*

COMPOSITION DEED.

1. Parties who sign composition deeds must do so in good faith: *Bean, assignee, v. Brookmire et al.*, United States Circuit Court, E. D. of Missouri, March term, 1873.

2. Secret preferences paid as inducements to obtain signatures of creditors to composition deeds, can be recovered by the debtor himself, or by injured creditors, or by an assignee in bankruptcy, who represents both debtor and creditor: *Ib.*

3. Such recovery may be at law or in equity: *Ib.*

4. It is no defense to such an action that the composition deed was invalid, because not signed by all the creditors, pursuant to its terms, it appearing that the greater part of the creditors believed that the composition had been signed by all the creditors in good faith: *Ib.*

COMPROMISE.

An agreement to compromise a disputed claim upon a policy of insurance at a certain sum must be one which would operate as a satisfaction of the contract of insurance before it can be offered as a defense to an action upon the policy. A compromise agreement, like an accord and satisfaction in order to take away the right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation, and must bind both parties, so that either could enforce it: *Benj. Luce v. Springfield Fire & Marine Insurance Company*, United States Circuit Court, W. D. of Michigan, March, 1873.

CONFEDERATE MONEY.

The consideration of a promissory note given for borrowed money, is not the check on a bank by which it is to be drawn, but the money obtained by the borrower; and when this money was Confederate currency, the note is without consideration in a suit upon it by the payee against the maker: *Whitfield v. Bishop Telford*, Supreme Court of Alabama, Jan. term, 1873.

CONTESTED ELECTION.

A contest of an election attacks the election itself, its regularity or fairness, or validity; not the proceeding subsequent thereto, as the certificate and induction: *Curry v. Wright*, Supreme Court of Tennessee, April, 1872.

CONTINGENT REMAINDER.—Possibility of Issue.

A woman with a life estate in a fund purchased shares of remaindermen to whom the fund was limited, in the event she died without issue; and filed her bill to have the shares paid to her, alleging that she was past child-bearing:

Held, that she was not entitled, as she might still bear children: *Garner v. Darling*, Supreme Court of Tennessee, Sept., 1872.

CONTRACT—Compensation for Sale of Real Estate.

Contract by plaintiff declared upon a defendant, the owner of land, to pay plaintiff, a real estate agent, \$200 if he sold certain land for \$1800, owner to have the right to sell if he could. By means of advertisements made by the plaintiff, a purchaser was put upon inquiry, came to Tennessee from New York, applied direct to defendant, made a parol contract to buy at \$1800, but finally bought at \$1600:

Held, that plaintiff was not entitled to recover: *Charlton v. Wood*, Supreme Court of Tennessee, Sept., 1872.

DECREE—Order Suspending—"Justice Requiring."

Decree against the Bank of Tennessee to abate the purchase money of a tract of land sold by the bank by the value of a dower interest held by paramount title. Leave at the same term to vacate the decree if the defendant showed by affidavit that justice required that he, as assignee of the bank, be allowed to make defense:

Held, that an affidavit showing that defendant had filed a bill enjoining all creditors from filing bills or suing out process in other courts, and to settle and adjust all claims against the bank, did not authorize the court to vacate the decree: *Tipton v. Bank of Tennessee*, Supreme Court of Tennessee, Sept., 1872.

DEED—Privy Examination.

1. The omission of the word "understandingly," in a certificate of privy examination of a *feme covert* to her, and of conveyance, is a fatal defect: *Anderson v. Bewley*, Supreme Court of Tennessee, Sept., 1872.

2. Such defect is cured by the lapse of twenty years from the date of registration: *Ib.*

ELECTION.

A returning officer of election has no judicial power. He can not reject ballots or adjudicate upon the validity of the election as returned to him by the judges. When he has computed the vote and issued the certificate, his functions and duties are at an end. He can not amend his returns or reject votes: *Curry v. Wright*, Supreme Court of Tennessee, April, 1872.

EQUITY POWERS.

1. This court will so deal with its equity powers as to make them serve all the purposes of justice to which they can be made applicable: *Geo. Keefer, trustee, etc., v. Jos. Emerick, trustee, etc.*, Supreme Court of Pennsylvania, March 17th, 1873.

2. A dispute between two unincorporated church organizations, as to the use of the church edifice, is within the equity powers of the courts: *Ib.*

3. A church congregation, limited in the use of a building to the holding of divine service, was restrained from holding a Sabbath School there: *Ib.*

ESTOPPEL.

1. An equitable estoppel is not available in an action at law: *Calvin Branson et al. v. Jacob Wirth*, Supreme Court of United States, March, 1873.

2. If one person is induced to do an act prejudicial to himself in consequence of the acts or declarations of another, on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations. But the person charged may explain, and equity will decree according to the justice of the entire case: *Ib.*

3. A party who has sold land by parol, to enable his vendee to sell to another, who recommends to that other to purchase, and witnesses the bond for title—such purchaser being ignorant of the claim of the parol vendor—can not set up his right

against such purchaser, but will be enjoined in equity from molesting the purchaser: *Gheene v. Osborne*, Supreme Court of Tennessee, Sept., 1872.

EVIDENCE.

In a suit against a railroad company to admit statements of unknown persons that the train is going at a furious rate, is error. It might be otherwise, if the person was a conductor or agent of the company having control of the train: *M. & C. R. R. Co. v. Pillow*, Supreme Court of Tennessee, April, 1872.

EVIDENCE.—Threats.—Hearsay.

In action of trespass, the threats of a person other than the defendant to do the act complained of, made before the act, are admissible in evidence: *Susong v. Ellis*, Supreme Court of Tennessee, Sept., 1872.

EVIDENCE.—Deposition.

1. It is not error for a Circuit Judge to refuse to examine experts to contradict the certificate of a commissioner, that the deposition is in his own handwriting, by comparison of the signature with the deposition: *Bailey v. Brooks*, Supreme Court of Tennessee, Sept., 1872.

2. A commissioner of deeds is authorized to take depositions: *Ib.*, Code 190.

FORCIBLE ENTRY AND DETAINER.—Appeal.—Pauper Oath.

Since the Act of 1869-70, ch. 64, a defendant in forcible entry and detainer, may prosecute an appeal in *forma pauperis*: *Burns v. Haggard*, Supreme Court of Tennessee, Sept., 1872.

FOREMAN.

Indictment signed by E. D. R., foreman. Record showed that J. C. Y. was appointed foreman on the first day of the term. On the sixth day, E. D. R. was appointed, *pro tem.*, but the entry did not show that J. C. Y. was absent, or had been excused or discharged:

Held, good: *State v. Collins*, Supreme Court of Tennessee, Sept., 1872.

FRAUDULENT CONVEYANCE—Creditor of Trust.

A mortgagee having purchased under a foreclosure of a mortgage made to secure a pre-existing debt, filed his bill to have a previous conveyance of the mortgagor of the land mortgaged declared void, as being "fraudulent and without consideration," and to have the land sold, to sever the interest of joint purchasers with the complainant. He made the fraudulent vendee a party, but not his vendor:

Held, that the bill filed did not present the complainant in his character of a creditor, but as a purchaser, and did not raise the question whether the deed was fraudulent against creditors: *Tyler v. Hamblin*, Supreme Court of Tennessee, Sept., 1872.

GENERAL ISSUE.

On an appeal where the record does not show what pleas were filed, if the trial was by a jury, this court will presume the trial was had on the plea of the general issue, and the case will be here disposed of accordingly, and no defenses will be considered, but such as might, properly, have been made under the plea: *May v. Sharpe*, Supreme Court of Alabama, Jan. Term, 1873.

GRANT.

1. A grant issued from the State of North Carolina, dated in 1788, purporting to be near the Mississippi river, in fact, by its calls it crossed the river into what was then Spanish territory. By a change in the channel about 1822, the river making a cut-off left the old bed and all the contents of the grant on the Tennessee side:

Held, that the grant as to the land in controversy, which was beyond the thread of the stream, was void: *Moss v. Gibbs*, Supreme Court of Tennessee, April, 1872.

2. In 1789 North Carolina ceded the territory of which Tennessee is composed to the United States. In 1796 it was admitted as a State. The United States retained the title to the lands south and west of the Congressional Reserve Line, until 1846. In the meantime she had acquired the Spanish title to lands west of the river. Arkansas was admitted in 1836, but as the change had then taken place, the *locus in quo* was not included in the boundary of that State, which on the east was the Mississippi river. The cession of 1846 by the United States to Tennessee, included all the lands east of the river, and Tennessee thereby acquired the title. Her grant subsequent to that date is therefore valid: *Ib.*

HOMESTEAD.—Exemption.

The question whether the Homestead Exemption Act of 1870, ch. —, passed 27th of June, can constitutionally operate on debts contracted before its passage, can not be raised where the debt was contracted after the passage of the act of 27th of March, 1868, on the same subject—such contract being subject to the same exemption substantially that is provided by the later acts: *Deatherage v. Walker*, Supreme Court of Tennessee, Sept., 1872.

ILLEGAL CONSIDERATION.

1. Bonds issued by authority of the convention of Arkansas, which attempted to carry that State out of the Union, for the purpose of supporting the war levied by insurrectionary bodies then controlling that State against the Federal government do not constitute a valid consideration for a promissory note, although bonds of that character were used as a circulating medium in Arkansas and about Memphis in the common and ordinary business transactions of the people: *Louis Hanauer v. A. M. Woodruff*, Supreme Court of United States, December Term, 1872.

2. The case of *Thorington v. Smith*, reported in 8th Wallace, approved, but distinguished from the present case: *Ib.*

JOINT AND SEVERAL OBLIGATION.

Held, 1. That if one of two joint obligors die, the debt is extinguished against his representative, and the surviving obligor is alone chargeable: *Pickersgill v. Tuhens et al.*, United States Supreme Court, December term, 1872.

2. In this class of cases, where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several: *Ib.*

3. The court will not vary the legal effect of the instrument, by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself, that the parties concerned intended to create a separate, as well as a joint liability; but if, through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This may be done where there is a previous equity, which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money loaned to both of them, and in such case a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay; and that the reasonable presumption is, the parties intended their contract to be joint and several: *Ib.*

4. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation to pay the obligee independent of his covenant: *Ib.*

JUDGMENT.

Where a party claiming property under a judgment and law of execution, introduced the judgment with the warrant and a declaration filed before the J. P., who rendered this judgment, showing by its averments that it was upon an indorsement, not waiving demand and notice, of a note for more than \$150, the judgment was held void: *Wolf v. Eakerly*, Supreme Court of Tennessee, April, 1872.

JUSTICE OF THE PEACE—PLEADING.

A written plea of one statute of limitations does not preclude a plaintiff in a proceeding instituted before a Justice from proving on a trial in court that another time applies, which has not run: *Bailey v. Brooks*, Supreme Court of Tennessee, September, 1872.

LAND LAW.

An adjudication of an entry under a North Carolina land warrant, by the Commissioners acting under the act of 18—, vests the beneficial title of the land in the claimant, and a grant from the State to another party will be held in trust for him: *Buck v. Williams*, Supreme Court of Tennessee.

LANDLORD AND TENANT.

When a landlord, before the end of the term, informs the tenant holding a lease for a year, that he will demand a certain named sum for the next year, if the tenant is silent and says nothing, and after the end of the term, continues in the use and occupation of the premises for the year, the law will imply a promise on his part to pay the rent named. If, however, the tenant, at the time, says he will not give that rent, will not take the premises at that price, then no such implication can be made. In such case, the tenant will be liable to pay a reasonable rent during the period of his occupation, and nothing more: *Meaher v. Pomeroy*, Supreme Court of Alabama, January term, 1873.

LEASE—Construed.

A lease providing that the lessee is to cultivate all the old land, and to have three crops off of all the land he clears, to clear six acres for the present year, the next year ten acres, and the rest to be agreed to hereafter, is a lease of the whole land for three years after the last clearing is done, and not of each portion for three years from the time it was cleared: *Dodson v. Hall*, Supreme Court of Tennessee, September 1872.

LETTERS OF CREDIT.

1. Letters from a commission house to a cotton buyer, as follows: "Should you feel inclined to try this market, either in the way of speculation or with a portion of your own crop, it will afford us pleasure to serve you, and your drafts will meet with due honor at our hands," and "if you can ship any more, you can draw at sight; your own cotton we are holding," are letters of credit to the persons addressed: *Smith & Ferguson v. Ledgyard, Goldthwaite & Co.*, Supreme Court of Alabama, January term, 1873.

2. And if made known to a banker who discounts, on the faith of them, the drafts drawn by the buyer on the writer, the promise inures to him. It is not necessary that he should have actual sight of the letters: *Ib.*

3. He may sue in his own name for a breach of the promise, if the house refuses to accept the bills. *Ib.*

4. If the house dissolves by the withdrawal of one member, and the remaining members resolve themselves into a new partnership, continuing the same business.

and not countermanding the letters, but receiving the shipments and paying the draft. as before, the new house ratifies and confirms the letters, and is responsible for drafts drawn on it as the first house was: *Ib.*

MECHANIC'S LIEN.

If a bill be filed to enforce a mechanic's lien which is demurrable, and long after, the time allowed by law an amended bill is filed, which is answered on the merits, and the case proceeds to decree to sell for the satisfaction of the debts claimed, it is too late to object to the jurisdiction or the propriety of the relief: *Brown v. Jacoba*, Supreme Court of Tennessee, April, 1872.

MUNICIPAL CORPORATION.

1. A city can not be held liable for injuries resulting from the defective execution of its officers or agents: *Wm. Ogg v. City of Lansing*, Supreme Court of Iowa, Dec., 1872.

2. In discharging its legislative functions, a city acts a quasi sovereignty, and is not responsible to individuals for a neglect or non-feasance of its officers or agents: *Ib.*

3. Where the bonds of a municipal corporation have passed into circulation, and into the hands of *bona fide* holders for value, and such bonds bear upon their face the assertion that the pre-requisites have been complied with, the town is estopped from asserting or pleading a denial of the performance of such pre-requisites: *Savings Bank of Portsmouth v. The Town of Yellow Head*, U. S. Circuit Court, Northern District Illinois, Feb., 1873.

NEGOTIABLE PAPER.

1. In the case of negotiable paper, a contemporaneous parol agreement is inadmissible to vary the effect of the written contract: *Heist v. Hart*, Supreme Court of Pennsylvania, March 10, 1873.

2. Though a note given to effect a fraud is, as between the parties, a nullity, yet it is good in the hands of a *bona fide* holder for a valuable consideration: *Ib.*

PARTNERSHIP.—Contract, *inter sese*.

Three partners engaged in buying hogs agreed not to buy at a price higher than \$4 per hundred. One partner bought a lot at \$4.25:

Held, that he was liable to account for the difference: *Looney v. Gillenwaters*, Supreme Court of Tennessee, Sept., 1872.

PARTNERSHIP.

1. A partner who entrusted depreciated notes to an agent to dispose of, will be held to account to the other partners for the waste of the proceeds by the agent selected by him, if by the partner's negligence the proceeds are lost to the firm: *Taylor v. Hamblin*, Supreme Court of Tennessee, Sept., 1872.

2. Where one surviving partner permitted the widow and heirs of a deceased partner to occupy partnership realty:

Held, that another surviving partner could not make him account for the value of the rents, on the ground that he ought to have collected it: *Ib.*

PATENT RIGHTS.

1. A license granted to use a patented article for a term of years, the licensee covenanting to manufacture and "to use his business tact and skill to introduce and sell" the product, on the death of the licensee will survive to his personal representatives: *Finnic v. Morgan*, Supreme Court of Tennessee, April, 1872.

2. The licensee having contracted with another to manufacture the product, on certain terms involving his personal services, but providing for a substitute in his absence

at a certain price and for a fixed time, the licensee died within the term, and the other party obtaining a similar license, continued to manufacture:

Held, that he was liable to an account for the profit on so much of the product as the market would justify—not so much as the machinery was capable of producing: *Ib.*

PLEADING.

To an action of A. and B., and for throwing plaintiff and wife and property out of his house, defendant pleaded that he was Deputy Sheriff; that a writ of possession had come to his hands on a final judgment in a cause wherein Diana White was plaintiff and Barbara Pettit defendant, by which he was commanded to put Diana White in possession of certain premises, and that the supposed trespasses were committed in the execution of this writ:

Held, to be a defective plea: *Kelley v. Fritz*, Supreme Court of Tennessee, Sept., 1872.

PRINCIPAL AND AGENT.

1. An agent who receives the funds of his principal to purchase lands for him, can not repudiate his trust and purchase the land for himself with his own and his principal's funds, and then set up the statute of frauds in his defense, because his agency did not rest upon written authority: *Firestone v. Firestone*, Supreme Court of Alabama, Jan. Term, 1873.

2. Such an agency is a matter of trust, and in such matters chancery has original and plenary jurisdiction: *Ib.*

PROMISSORY NOTE.

1. In an action against a surety on a promissory note, instituted by the payee, no recovery can be had on such note if it has been altered by the maker, who is the principal and the payee, after its execution by the surety, without his consent or knowledge, to the prejudice of the surety: *Glover v. Robbins*, Supreme Court of Alabama, Jan. Term, 1873.

2. The addition to such promissory note of the words "with interest at four per cent.," is such an alteration as avoids the note as against the surety: 32 Ala., 480; 6 Wall., 80; *Ib.*

3. After such alteration no recovery can be had on such note upon a count describing without the alterations: 19 Johns, 391; 32 Ala., 432; 1 Greenl. Ev., 5, 565; *Ib.*

4. In an action on a promissory note for the payment of money, it can not be shown, by parol evidence, that it was agreed by the defendant and the payees, before the note was given, that it might be discharged in some other way: *Clarke v. Hart*, *Ib.*

RECITALS.

Recitals, in a private act of Congress, bind none but those who apply for it, and are not evidence of the matters recited, except against the parties who procure the recitals to be made in the act: *Calvin Branson et al. v. Jacob Wirth*, United States Supreme Court, March, 1873.

REGISTRATION.—What is notation of a deed.

A deed was brought into the register's office for registration and left with a person staying in the room, but not connected with the office, who noted the time of its being brought to the office on the back of the deed. Afterwards, but before the deed was noted on the note book or registered, an attachment was levied on the property:

Held, That the attachment had priority of the deed. That notice of the deed to the creditor was not material: *Wilson v. Eijler*, Supreme Court of Tennessee, Sept., 1872.

REPLEVIN.—Prosecuted in Trover Bond.

1. A suit commenced in replevin before a Justice of the Peace, but in which the property is not delivered to the plaintiff, and prosecuted in trover or detinue, and appealed in *forma pauperis*, can not be quashed for want of bond or affidavit: *Stone v. Hopkins*, Supreme Court of Tennessee, Sept., 1872.

2. That the failure to obtain the property does not appear by the officer's return, is not material if it appear in the record otherwise: *Ib.*

RESCISSION.

After accepting a deed with covenants of seisin and warranty, and paying a portion of the purchase money, a purchaser entitled to possession can not sustain a bill to rescind on the ground of failure of bills, though on the discovery of the defect he had refused to take possession: *Armstrong v. Harris*, Supreme Court of Tennessee, April, 1872.

SALE OF LAND.—1827, ch. —. Effect of Refusal of Specific Performance.

In the Act of 1827, ch. —, Code 2267, providing for a sale to pay debts of real estate of which the deceased died *seized* and *possessed*, the latter words are not used in their strict technical sense. But they do not embrace lands of which the deceased was in possession under a contract which a court of equity has refused specifically to execute: *Millegan v. Humbard*, Supreme Court of Tennessee, Sept., 1872.

SCIRE FACIAS.

In a *scire facias* upon a forfeited recognizance, it is necessary to set out the recognizance, or so much of it as shows the nature of the undertaking of the bail: *State v. Johnson*, Supreme Court of Tennessee, Sept., 1872.

SET-OFF.—Depends on Plaintiff's Right.—Judgment in Supreme Court.

1. Plaintiff sued on a note for \$300. Defendant relied on payment and set-off, and proved that the debt was over paid before suit was brought, and that a sum was due him. The jury found for the defendant and against the plaintiff, that he owes \$132.36:

Held, that this is a finding that nothing was due the plaintiff, and no judgment be pronounced for the amount found due the defendant, but that the defendant recover his costs simply: *Henry v. Walker*, Supreme Court of Tennessee, Sept., 1872.

2. When a set-off has been pleaded, the plaintiff is not at liberty to dismiss his suit: *Galbraith v. E. T. and Va. and Ga. R. R. Co.*, Supreme Court of Tennessee Sept., 1872.

3. A plaintiff promised to pay to a defendant the value of his wagon and team if lost in a certain adventure:

Held, that the property being lost, the value was subject to be set-off in any suit upon a debt brought by plaintiff against defendant: *Lowry v. Hans*, Supreme Court of Tennessee, Sept., 1872.

SIDEWALKS.

1. The act of 24th November, 1866, authorizing the city of Memphis to assess the price of paving the streets upon the owners of the lots fronting on the streets, is unconstitutional and void: *Taylor v. Hart*, Supreme Court of Tennessee, April, 1872.

2. The decisions of the court as to sidewalks are not intended to be disturbed by this decision: *Ib.*

3. The latter question was raised in *Crosier v. Corporation of Knoxville*, Sept. 14, 1872, and the power as to sidewalks sustained: *Oral opinion.*

SOLDIER'S BOUNTY.—Assignment.

The assignee of a soldier's bounty claim, where the assignment is void because made before the claim is allowed, may, upon his assignor obtaining the money from the soldier, receive of his assignor the price paid by the assignee for the claim: *Curden v. Boyd*, Supreme Court of Tennessee, Sept., 1872.

STATE AND UNITED STATES COURTS.—Conflict of Jurisdiction.—Priority.

Attachment from a State court was levied on goods by Sheriff. On the same day a creditor obtained judgment in the United States Court, and afterward the Marshal went with an execution to levy on some goods. Finding them in the hands of the Sheriff, he desisted. The goods were sold under order of the State court, and were in the hands of a receiver when the creditor filed his bill to reach the point under his United States judgment, claiming that his lien related to the first day of the term of the court, the fourth Monday of November, 1865, which was anterior to the levy of attachment:

Held, that in a conflict of liens between two distinct jurisdictions, the first seizure controls the right, and that the claim of complainant could not be enforced: *Longstreet v. Hill*, Supreme Court of Tennessee, Sept., 1872.

STATUTE OF LIMITATIONS.—Non-suit.

Where a voluntary non-suit is taken, and a new suit brought within a year, the bar of the statute is saved under the Code, 2755: *M. and C. Railroad Co. v. Filer*, Supreme Court of Tennessee, April, 1872.

SUICIDE.

Where a policy of life insurance contains a proviso that it shall be void in case the assured shall commit suicide or die by his own hand, and the assured being in the possession of his ordinary reasoning faculties, intentionally takes his own life, the proviso attaches, and there can be no recovery upon the policy. But if the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act; but, when his reasoning faculties are so impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the proviso of the policy, and the insurers are liable: *Mutual Life Ins. Co. of New York v. Mary Terry*, Supreme Court of the United States.

TAX SALES.

1. Under the laws of the United States for the sale of lands for taxes, the Commissioners were not empowered to make sales until the whole county in which they were acting was occupied by the military forces of the United States: *Buck v. Williams*, Supreme Court of Tennessee, April, 1872.

2. Where the sale took place under such circumstances, defects in the advertisement may be looked to, if they are not fatal in all cases: *Ib.*

TAX.

1. As a general rule, courts of equity ought not, except upon the clearest grounds, interfere with the speedy collection of the public taxes: 25 Conn., 232-33; Barb. 322: *Tallassee Man. Co. v. Spigener*, Supreme Court of Alabama, Jan. term, 1873.

2. In this State, Chancery has interfered only in cases where the tax is wholly illegal and unauthorized by law: 38 Ala., 156; 45 Ala., 220, 310: *Ib.*

3. A bill which shows that a part of the tax sought to be enjoined is legal, and a part illegal, will not be sustained without alleging a full payment of all the tax legally assessed: *Ib.*

TAXATION.

1. A State may tax the franchises of its carrying companies, and the tax may be proportioned either to the value of the franchises granted, or to the extent of their exercise: *Philadelphia and Reading Railroad Co. v. Commonwealth*, Supreme Court United States, March 10th, 1873.

2. The gross receipts of a company may be taken as a measure of the value of its franchises, or of their enjoyment, and a tax may be laid thereon: *Ib.*

TENANT IN COMMON AND IN DOWER.—Improvements by Partition.

1. Where the husband of the owner of dower in a tract of land became the owner of 8-11ths of the whole land as tenant in common with three others, and occupied the whole for many years, making improvements on the portion held as dower:

Held, that he might claim compensation as tenant in common, though he could not have done so as husband of the dowress: *Broyles v. Waddle*, Supreme Court of Tennessee, Sept., 1872.

2. In partition in equity, the court will allow for improvements by a joint tenant, or allow him to have the improvements assigned him: *Ib.*

13TH AND 14TH AMENDMENTS.

The charter of the Slaughter-house Company, a corporation created by a statute of Louisiana, contained, among other exclusive privileges, the right to establish and maintain stock-yards and landing-places and slaughter-houses for the City of New Orleans, at which all stock must be landed, and all animals intended for food must be slaughtered. This grant of privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all butchers to slaughter at those places, was a police regulation for the health and comfort of the people, (the statute locating them where health and comfort required,) within the power of the State legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment. The Parliament of Great Britain and the State legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good; and the power here exercised is of that class, and has until now never been denied. It is now claimed that such power is forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments, and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. In giving construction to any of those articles, it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview, whether the party concerned be of African descent or not. While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude; and the use of the word servitude is intended to prohibit all forms of involuntary slavery of whatever class or name. The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions. The second clause protects from the hostile

legislation of the States the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the States. These latter, as defined by Justice Washington, in *Corfield v. Coryell*, and by this court in *Ward v. Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments, and of this class are those set up by plaintiffs. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment. It is not necessary to inquire here into the full force of the clause forbidding a State to enforce any law which deprives a person of life, liberty, or property, without due process of law, for that phrase has been often the subject of judicial construction, and is, under no admissible view of it, applicable to the present case. The clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and for this purpose the clause confers ample power in Congress to secure his rights and his equality before the law: *Butcher's Benevolent Association v. Crescent City Live-Stock, Landing and Slaughter-House Co.*; *Paul Estlin et al. v. State of Louisiana, ex rel., Attorney-General*.

TROVER.

Where the crops produced on land are to be divided between the landlord and tenant, or employer and employee, they are held by tenancy in common. The possession of one is that of the other, and a sale of the entire interest by the party in actual possession is a conversion, for which the other may maintain trover: *Neilson v. Slade*, Supreme Court of Alabama, Jan. Term, 1873.

UNRUPING OFFICE.

1. A bill which charges that a returning officer received the returns from his deputies, compared them, found that relator was elected, and made out a certificate of election, but failed to deliver it; that the returns were entered on the minutes of the County Court; that relator appeared in court and tendered bond, oath, etc., and claimed to be inducted; but his opponent instituted contest and enjoined, and afterwards returning officer made an amended return, in which he rejected the vote of one ward as illegal, whereupon the County Court inducted his opponent, is a proper bill under the Code, 3409. It is not a case for contesting the election, Code, 3423: *Curry v. Wright*, Supreme Court of Tennessee, April, 1872.

2. If the opponent desires to contest the validity of the election, he can not do it under such bill, but may institute a separate proceeding—*Nicholson and Turney* dissenting on this point: *Id.*

VALUED POLICY.

A valued policy is one which determines beforehand the amount for which the insurer is liable in case of loss; it not only values the property, it also values the loss. Where a policy insured the holder thereof against loss or damage by fire to the amount of \$2,500, upon a large number of oil paintings "as per schedule," and the schedule referred to named the paintings, placing opposite the name of each, figures like \$1,000, without using the words "valued at," "worth," or other equivalent words: it was

Held, not to be a valued policy: *Benj. Luce v. Springfield Fire and Marine Insurance Company*, United States Circuit Court, Western District of Michigan, March, 1873.

VENDOR'S LIEN.

1. Where the vendor of land retaining the titles, releases his immediate vendee from liability, and accepts, instead thereof, the individual note of one acting as the agent of a subsequent vendee to procure the title, which note specifies that its consideration is the purchase money due for the land, the vendor's lien is not waived, but passes to transferee of such note: *Nathan Bozeman et al. v. J. J. Ivey*, Supreme Court of Alabama, Jan. Term, 1873.

2. And the equity of the case is not affected by the fact that the maker of the note was an independent debtor to the released vendee for other lands, and that the note and release operated between them as an extinguishment of the indebtedness: *Ib.*

3. The released vendee is not an indispensable party defendant to enforce the lien, but he may be made a party by cross-bill if material to the defense: *Ib.*

4. The vendor's lien follows the debt until it is paid or extinguished, or the lien is released by the contract of the parties: *Ib.*

VERDICT.

Where the jury being unable to make a verdict agreed that the foreman should appoint three of their number to whom the amount of the verdict should be referred, and the amount fixed by them to be the verdict:

Held, error: *M. & C. R. R. Co. v. Pillow*, Supreme Court of Tennessee, April, 1872.

WILL.

1. S. in the body of his will gave to J. B. & B. W. Mason, a considerable legacy, and then added in the same clause, these words, to-wit: "And for and in consideration of the above, the said J. B. & B. W. Mason will see that Sarah A. Menifee, my sister, will be amply provided for, should she ever be so unfortunate as to have any cause for such protection; and to Sallie A. Boyd, they, J. B. & B. W. Mason, will pay four thousand dollars, one-half at the settlement of my estate, and the other half twelve months thereafter:"

Held, that the legacy to Mrs. Boyd is a charge on the legacy to J. B. & B. W. Mason, and if they accept the legacy to them, they become personally liable to pay the legacy to Mrs. Boyd: *Mason et al. v. Smith et al.*, Supreme Court of Alabama, Jan. Term, 1873.

2. A codicil added to such a will (in which will the whole residue of the testator's estate is already disposed of) in these words, viz: "I hereby revoke the donation, in the body of my will, to Sallie A. Boyd, and give her a proportionate share with the rest of my nieces," only revokes the sum to be paid to Mrs. Boyd, and directs a different method to fix its amount, but it does not change the fund out of which it is to be paid or the time and manner of its payment. It must be paid as the original legacy, for which it is substituted: *Ib.*

RECENT CHANCERY DECISION.

D. W. YANDELL AND WIFE vs. R. H. ELAM et al.

1. Funds, settled in trust upon a married woman and her children, in the custody and control of the Chancery Court of this State, may be transferred to the custody and control of the Chancery Court of another State, where the married woman and her children are domiciled, upon it being shown that such transfer is manifestly for the interest of the beneficiaries.
2. The mode of proceeding in the two courts to effectuate the transfer, considered.

On the 6th day of June, 1851, the sum of twenty thousand dollars of the estate of Frances J. Yandell, then, and now the wife of D. W. Yandell, was, by decree of this court, directed to be invested in bonds of the State of Tennessee, and the bonds were ordered to be transferred to Alexander Allison, as trustee, "for the sole and separate use of the said Frances J. Yandell, free from the debts and control of her husband, and from his marital rights; the interest and income to be reserved for her use during life, and after her death, the capital to vest in and belong to her children living at the time of her death, and any descendants of a child or children, should any of her said children die during her life-time. Her receipt, or orders signed by her, is to be sufficient authority for the payment of the interest or income arising from said capital of twenty thousand dollars."

The investment was made as directed, and the bonds deposited in the custody of the court. Afterwards, and over ten years ago, Alexander Allison departed this life, and no new trustee has been appointed in his place. At the present term of this court, Nathaniel Baxter, Jr., the Clerk and Master of this court, was appointed Trustee as to a portion of the fund, in order to superintend the loan thereof upon collateral security. Previous to this time, a portion of the trust fund, under the orders of my predecessors, the Chancellors of this district, was realized and paid over to persons authorized by Mrs. Yandell, or supposed to be so authorized, to be invested in Louisville, Kentucky, to which place she and her husband had removed not long after the settlement upon her, and where they have continued to reside for many years.

The case comes before me now upon the petition of Frances J. Yandell, by George Maney, her next friend, and sworn to by him, setting forth the fact that she and her husband have been many years resident citizens of the city of Louisville, Kentucky, and are there permanently domiciled, with their children, and suggesting that it is manifestly for her interest and that of her children, that the trust fund now in this court as aforesaid, should be transferred to the control and jurisdiction of the Chancery Court at Louisville, in said State. She states that she has instituted proceedings in the said Chancery Court at Louisville, with a view to have the said trust funds transferred to that court. She prays for such transfer accordingly, and makes a transcript of the proceedings in said Chancery Court, duly certified, an exhibit to her petition.

Upon an examination of this transcript, it appears that on the 31st day of October, 1872, a petition was filed in the name of Frances Yandell, in said Chancery Court at Louisville, stating the existence of a fund in this court held in trust for her; that the trustee appointed by this court was dead, and that no successor had been appointed.

She prayed in said petition that D. W. Yandell, her husband, be appointed trustee and be authorized to withdraw said fund from this court. This petition was signed and sworn to by her attorney.

An answer to this petition was filed by D. W. Yandell, on the same day, and, on the 7th day of December, 1872, an order was made in accordance with the prayer of the petition, appointing D. W. Yandell, trustee, without bond or security, and undertaking to authorize him to take charge of the property held by this court.

The solicitor of Mrs. Yandell, in this court, very properly declined to make any application to this court based upon these proceedings, being satisfied that the application would not be entertained.

On the 2nd day of April, 1873, an amended petition was filed in the said Louisville Chancery Court, by Mrs. Yandell, duly subscribed and sworn to by her, against her husband, D. W. Yandell, and their two children, Susan and Maria Yandell, both infants, repeating the facts stated in the original petition, and alleging that the petitioner and the defendants were the only persons interested in said fund in this court, and that it was for her interest and the interest of her children that the fund should be brought to, and kept in the custody and control of, the Louisville Chancery Court, within whose jurisdiction the parties interested were permanently domiciled. A duly certified copy of the original decree of this court settling the fund in trust for Mrs. Yandell and her children, was made an exhibit to the petition. The prayer of the first petition, was repeated as the prayer of the amended petition.

Upon this amended petition, process of summons issued and was duly executed upon the infant defendants, Susan and Maria Yandell. Afterwards, a guardian *ad litem*, was appointed by the court, who appeared and filed an answer for them. The husband filed an answer in proper person, admitting the facts to be as charged. The cause was brought on for hearing before the Chancellor on the 25th day of April, 1873, who delivered an elaborate and satisfactory opinion in writing, which is embodied in the record, and forms a part of the proceedings. The opinion commences by showing that, under the code of practice of the State of Kentucky, a married woman is authorized to sue alone when the action concerns her separate property, or is between herself and her husband, and that, consequently, Mrs. Yandell was entitled to maintain this suit in her own name, without the assistance of a *prochein amie*, the fund settled upon her by the decree of this court being clearly her separate property within the meaning of the code, and by the laws of the State of Kentucky. The Chancellor is further of the opinion that, by the statute law of Kentucky, which he cites, it is provided that the trust property in question "shall not be sold or encumbered by order of a court of equity, and only for the purpose of exchange and re-investment for the same uses as that of the original conveyance or devise, and the court shall see that the exchange or re-investment is properly made;" and that said fund, if brought within the operation of the laws of the State of Kentucky, and the jurisdiction of its courts, could only be sold or encumbered by order of a court of equity, and then only for exchange and re-investment for the same use as that of the settlement of the Tennessee courts; and if done by a Kentucky court, it would be its imperative duty to see that the exchange or re-investment is properly made.

The Chancellor is also of opinion that the order of his predecessor upon the original petition, the 7th day of December, 1872, appointing the husband trustee without bond, was made, doubtless, in ignorance of the character of the estate, and, in view of the fact that it is doubtful whether the court can appoint a trustee at all until it has obtained control of the fund, was imprudent to say the least, and he expressly sets aside and rescinds that order. The Chancellor, in reference to the relief sought by the petition, is clearly of the opinion that he can do nothing without the

concurrence of this court. But, upon principle, he thinks that the two courts might by appropriate orders and decrees, invest his court with the custody and control of the estate in question. He concedes that it is for this court to determine whether the removal can be made without prejudice to any of the citizens of Tennessee, and whether it is for the interest of the *cestuis que trust* that it should be done. "The whole aim," he very properly says, "of the Tennessee Court in making the settlement, was to secure the property to the separate use of Mrs. Yandell, during her life, and then to her children." "If this court," he adds, "had the custody and control of the property, it could, and it would be its duty, to secure those important objects."

In accordance with the foregoing opinion, it was ordered, adjudged, and decreed upon said petition, that if this court would send the fund to that court, said last mentioned court "will take custody and control of the same by its proper officers, and that it will also, by its proper officers, cause said money, stocks, bonds, or other property to be exchanged for, or re-invested in, other property, real or personal, as may seem best for the *cestuis que trust*, and cause the title or titles thereof to be vested in a prudent and competent trustee," upon the uses and trusts of the original decree of settlement, setting the same out in *hæc verba*. The decree further provides that if this court chooses to send and deliver the funds to that court, that said court will cause to be paid out of said estate to the proper officer of this court his actual expenses, and a reasonable compensation for making the transfer; or if the court should prefer to order the fund to be paid to a receiver of that court, said court would send the regular, or a special receiver of said court therefor, first causing said receiver to execute a sufficient bond to secure a faithful discharge of the duty imposed upon him.

The old rule that personal property has no locality, and follows the law of the owner's domicile, was always subject to many limitations, and has been still further restricted by recent decisions. Mr. Wharton, in view of these decisions, as well as the learning of continental jurists, does not hesitate to reverse the general rule as formerly understood, and to assert the opposite principle, that movables are governed by the *lex rei sitæ*: Whart. Conf. of Laws, § 297. And he seems to be justified in the enunciation of the following statement of the present result of the decisions: "Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law: Whart. Conf. L., § 311; *Green v. Van Buskirk*, 7 Wall., 312; *Waters v. Barton*, 1 Cold., 43.

A foreign administrator or executor, it is universally conceded, whose authority springs from the last domicile of the deceased, can not, by mere force of such authority, take possession of property in countries subject to the English common law. To do this, he must obtain legal authority to act in the courts of the *situs*: Whart. Conf. L., § 604, and the numerous cases there cited. "It is," says the Supreme Court of Tennessee, "an admitted principle of international law, that every State has the right to control and dispose of property actually within its jurisdiction; and it is the duty of every State to protect the rights of its own citizens, and to aid them in the recovery of their just debts, without the necessity of resorting to the distant forum of the original administration:" *Gilchrist v. Cannon*, 1 Cold., 581; and see also, *Keaton v. Campbell*, 2 Hum., 224, 241.

The learned Chancellor of the Louisville Chancery Court, was, therefore, clearly correct in conceding that it is exclusively for this court to say whether a proper case has been made out for giving up its control over the fund in controversy, and allowing it to be transferred to another jurisdiction. And I think he is equally correct

in concluding that, upon principles of *interstate comity*, the two courts might, by appropriate orders and decrees, secure the transfer of such funds from the jurisdiction and control of one court to the jurisdiction and control of the other.

Such transfers have usually been made in the administration of estates. In theory, the law has been held to be, that, when the funds in the hands of an ancillary administrator are sufficient to pay all legal claims existing in the jurisdiction by which such administration is granted, the administrator, after paying all claims and settling his accounts, should transmit the residuum to the decedent's domicile: *Preston v. Kelville*, 8 Cl. and F., 1; *Maskey v. Cox*, 18 How. U. S., 100; *Davis v. Head*, 3 Peck, 128; *Parker's Appeal*, 61 Penn., 478.

The transmissibility of the funds of an estate, from the ancillary administrator of one estate to the administrator of the domicile in another, was treated as unquestionable in the case of *Keaton v. Campbell*, 2 Hum., 241. "But this means," the court say, "when a suit in Chancery has been brought by proper persons, the condition of the estate at home and abroad inquired into and ascertained, creditors, distributees, and others interested notified and indemnified, then the court may, by its acts and orders, transmit such fund." "Whether the court," they add, "would order it to be transmitted to the administrator himself, or to some judicial forum where the parties in interest were accounting, we care not to speculate."

In the case of *Baker Andrews' Heirs*, 3 Hum., 592, the question of the transmissibility of funds from this State to another again came before the court. In that case, the funds were derived from the sale of realty for division between the widow and heirs of a decedent. It was held that a foreign guardian of the minor heirs would not be entitled to receive the share of his wards without giving a special bond for the fund, either here or in his own State. The court add: "Nor would we hold that a court of Chancery should, in such cases, always require a bond to be executed in Tennessee and by Tennessee sureties. The interest of the parties, and sometimes the necessity of the case, may make it not improper that the bond should be executed, and the surety be given in the State where the general guardian and wards reside; but in such case, the court will see to it, that the guardian is a fit person, that the surety is amply good, that the bond in form and substance is valid by the law of the State where it is intended to be enforced, and that it clearly embraces, and renders the obligors liable for the bond in question."

"The people of the United States," say our Supreme Court in *Keaton v. Campbell*, 2 Hum., 237, "constituting one integral government for some purposes, are yet, for other purposes, a community of nations, so to speak, essentially distinct, and even foreign from each other. In this latter relation, they exist as to the comprehensive and highly important interests, founded upon the distribution of personal estate; while, at the same time, the internal commerce, social intercourse, frequent changes, and multiplications of domicile, and all the varied and widely ramified relations and annexing of a prosperous, enterprising and homogeneous people, create rights and interests as to personal property seldom to be limited to a single State." This state of things, they conclude, calls upon the judicial tribunals of all the States for the reciprocal exercise of a liberal comity.

The result of our authorities is, that a fund belonging to infants, or other persons under disability, may be removed from this State to the domicile of the parties in another State, provided the court is satisfied that it is for the interest of such parties, and is further satisfied that the fund is as well secured under the laws of the State to which it is removed as under the laws of this State. It is further to be inferred that our courts may transmit the funds to some judicial tribunal having jurisdiction of the parties, as well as to a trustee or guardian properly qualified.

There are no claimants upon the fund now in question, and no person has any interest in it except Mrs. Yandell and her children. It satisfactorily appears to the court that these beneficiaries have been permanently domiciled in the State of Kentucky, and in the city of Louisville. As a matter of course, it is for their interest, other things being equal, that the fund should be held and invested for them at their domicile, rather than in another State. The person entitled to the immediate use of the fund, the tenant for life, comes to me by petition and says that it is for her interest and that of her children that the transfer should be made, and she asks me to make it, accompanying her application by record evidence that she has instituted legal proceedings in the Chancery Court of her domicile, to which proceedings her children are made parties, to procure the consent of that court to the transfer, and its acceptance of the same control of the bond as is had by this court. She shows me that said court has agreed to receive the funds and assume the control and management of them, and I have the assurance of the Chancellor of that court, in the form of a written decision and of a decree, that the laws of Kentucky will recognize the trust fixed upon the fund by the decrees of this court precisely as the trust is recognized by the laws of this State, and that it is made his duty, and the duty of his court to see that the rights of the beneficiaries are as securely guarded as they would be by this court. Under these circumstances, I feel no hesitation in making the transfer as requested. I am satisfied that it is for the interest of the beneficiaries that the fund should be transmitted to the forum of their domicile, and their choice. In doing so, I am only obeying the calls of that "liberal comity," to use the words of our Supreme Court, which the judicial tribunals of the States of this Union owe to each other in the administration of the rights and property of their respective citizens.

The petitioner's counsel may draw up a decree reciting the proceedings in the Louisville Chancery Court and in this court for the transfer of the bond, and ordering the fund in question to be transmitted from the custody and control of this court to the custody and control of the said Louisville Chancery Court, upon the ground that such transfer is manifestly for the interest of the petitioners and her children. The clerk and master of this court will be authorized and directed to deliver the said fund to the proper officer of said court at Louisville, upon the order of said court, a certified copy of which order and the receipt for the fund, will be reported to this court and entered on its minutes. An order will be made requiring the clerk and master to report the present condition of the fund, how it is invested, and the exact amount, after deducting all costs, fees and allowances due to the officers of this court. A certified copy of that report, when confirmed, will, together with a copy of this opinion and of the decree entered upon it, be transmitted to the said Louisville Chancery Court with said funds. The clerk and master will also record at once in the record book of pleadings the petition filed in this cause and the transcript of the record accompanying it.

W. F. COOPER, Chancellor.

POLICY OF LIFE INSURANCE.

NEW YORK LIFE INSURANCE COMPANY vs. WHITE'S ADM'RS.

1. A., an Insurance Company doing business in New York, through its local agent, B., effected a policy at Portsmouth, Va., upon the life of C. The Company agreed that the sum of \$1,500 should be paid to the legal representatives of C., within sixty days after due notice and proof of his death, deducting therefrom all unpaid notes for premiums, provided in case the said C. should not pay the said premiums on or before the several days mentioned for the payment thereof, together with the annual interests on any notes that may have been given for 40 per cent., etc., then the policy to cease and determine. There was an indorsement on the margin of the policy in these words: "All receipts for premiums paid at agencies are to be signed by the President or actuary." All the premiums were regularly paid to the agent at Portsmouth to the 13th of August, 1861. C. died on the 19th of August, 1861. The premium due on the 13th of August, 1861, was not paid. There had been no communication between New York and Portsmouth for some time before the 13th of August, 1861, owing to the existence of war. C. was prevented from paying the premium due the 13th of August, 1861, for the reason that the Company had failed to furnish their agent at Portsmouth with the necessary renewal receipts, etc., made requisite by the indorsement on the margin of the policy. If the renewal receipts had been furnished the premium would have been punctually paid. C. made no tender of the amount of the premium. At the close of the war, the Company refused to pay the policy and suit was instituted:

2. *Held*, That the Company was liable.

WINGFIELD, J. On the 13th of August, 1857, John S. White effected a policy of insurance on his own life with the New York Insurance Company, whereby the Company in consideration of \$73 50 in hand paid, and of the annual payment of the like sum of \$73 50 on the 13th day of August, in every year during the continuance of the said policy, assured the life of the said John S. White, describing him as "John S. White, carpenter, of Portsmouth, in the county of Norfolk, State of Virginia," in the amount of fifteen hundred dollars, for the term of his natural life, commencing on the 13th of August, 1857, at noon, and did thereby promise and agree to and with the assured, his executors, administrators and assigns, to pay the said sum of \$1,500 to the legal representatives of the assured within sixty days after due notice and proof of his death, deducting therefrom all unpaid notes for premiums on the policy, with a proviso (among others), "That in case the said White shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, together with the annual interest on any notes that may have been given for 40 per cent., and such assessments thereon as may be made and called for by the trustees, then and in every such case the said Company shall not be liable to the payment of the sum assured or any part thereof, and this policy shall cease and determine," with an indorsement on the margin of the policy in these words: "All receipts for premiums paid at agencies are to be signed by the President or actuary." The policy was effected at Portsmouth through James T. Borum, the agent of the Company there, and all the premiums, etc., were regularly paid to said agent at that place, to the 13th of August, 1861. John S. White died on the 19th of August, 1861, in the arms of the said James T. Borum, agent of the said company.

The premium due the 13th of August, 1861, was not paid, and the assured was

prevented from paying it and the interest and assessment then due, because the Company had failed to furnish their agent at Portsmouth with the necessary renewal receipts and statement of assessments and interest due, according to the rules of the Company and indorsement in the margin of the policy. All receipts for premiums paid at the agencies had to be signed by the president or actuary, and only countersigned by the agent, and the agent had no authority to give receipts, but only to countersign those given by the President or actuary. There had been no communication between New York (where the Company was located) and Portsmouth, Va. (where White resided), for some time before the 13th of August, 1861, in consequence of the war then raging between the United States and the Confederate States—the assured being a citizen of the Confederate States, and the Company being located in the United States. The premium due on the 13th of August, 1861, was not paid on or before that day, or afterwards, and no formal actual tender of it was made to the agent at Portsmouth at any time. It was the custom of the Company to notify the assured the time when premiums fell due, and it was the duty of the agent to give the notices to the assured when they received the renewal receipts from the home office, but in this case no such receipts were sent to the agent, in consequence of which no notice was given to White, and the premium was not paid in consequence of the failure of the Company to furnish the renewal receipts to its agent according to all former usage. If he had had the renewal receipts, the premium would have been punctually paid.

White was a very prudent, careful man, and when the policy was effected, Borum, the agent of the Company, promised him to protect the policy, and agreed with him that if he (White) was absent at any time, or should forget it when any annual premium came round to be paid, he (Borum) would pay it for him, and so prevent any forfeiture of the policy, and he frequently afterwards renewed the promise to White, who was very solicitous about the punctual payment of the premiums. But Borum had no authority from the Company to make such an arrangement, and it knew nothing of it; and as to this matter, he was the agent of White and not of the Company.

If the agent (Borum) had had the renewal receipts, the premiums, etc., due on the 13th of August, 1861, from White, would have been paid by him. He had the money with which to make the payment (as did White likewise have it laid by for the purpose), and only did not make it because he did not have the renewal receipts and the want of authority on his part to give receipts for premiums.

On the 11th November, 1862 (after intercourse had been restored between New York and Portsmouth), Borum, their agent, wrote to the company in New York, informing them of the death of White, and that the premium, etc., would have been paid on the 13th day of August, 1861, if he had had a renewal receipt for the purpose, and that the failure to make the payment was occasioned by failure of the company to send the renewal receipts, as had been usual, to him as their agent, and stated that the company ought to pay the policy, and asked that the proper blanks for proving the death, in form, should be forwarded to him. To this, the company replied by letter dated 11th of December, 1862, in which they declined to admit their responsibility, and refused to pay anything to White's representatives, and failed to send the blanks requested for the purpose of making formal proof of the death of the assured.

A formal affidavit of the death of White was made on the 28th of June, 1867, and duly forwarded to the company by the attorney of the plaintiff on the same day to which the company, through their agents, Bain & Bro., responded, declining to pay the policy, but offering to pay \$84, and this suit was commenced on the 5th of September, 1867.

Upon the trial, a verdict was rendered in favor of the plaintiffs, and the company asked for a new trial, which was refused, and an exception taken, and the facts certified, the material parts of which have been already stated. The defendants asked for seven different instructions—the first was refused, the second given with an addition to it, and all the others given in the form asked for, and an exception was taken to the ruling of the court in regard to them. The counsel for the company, in his argument here has attempted to distinguish this case from that of *Manhattan Life Insurance Company v. Warwick*, 20 Gratt., 614. It is argued here, that there was no actual tender of the premium, as there was in that case. That there is no provision in the policy in this case, that it was not to be binding until countersigned by the agent in Virginia, as there was in that case, and that this is, therefore, not a Virginia contract to be performed here, but a New York contract to be performed there, and that whether it was one or the other it was an executory contract, and became void and dissolved by the operation of the late war, the parties being respectively domiciled in the opposing sections, and consequently, enemies; thus raising again, one of the main questions relied on by the insurance company in 20 Gratt., and overruled by a majority of the court.

Although the policy in this case does not provide that it was not to be obligatory until countersigned by the local agent, yet it is proved that it was effected in Portsmouth with the agent there, and was perfected by delivery and the payment of the advance premium to the agent at that place, and the succeeding premiums were all paid to the same agent, at the same place, upon receipts furnished by the Company for that purpose, signed by the President and countersigned by the agent, thus being treated and regarded by both parties as a Virginia contract to be performed on the part of the assured in Portsmouth, Virginia. No notice was ever given to the assured that he would be required to make payment anywhere else. Upon the supposition that this is a Virginia contract to be performed, as far as the assured was concerned, in Portsmouth, it is argued that the failure to pay or tender payment of the premium due the 13th of August, 1861, to Borum, the agent of the company at Portsmouth, was a forfeiture of the policy, and that the arrangement between White and Borum, whereby the latter agreed to protect the policy for White and pay the premiums for him when they fell due, in case White did not do it, was a private arrangement with themselves, not known to the company, and not binding on it, and did not dispense with a tender to him as agent of the company. It is very true that the company was not bound by this arrangement between White and its agent. Yet it was lawful for White to appoint an agent to make the payments for him, and it was as lawful for him to appoint Borum his agent to make them for him, as it was for the company to appoint him as its agent to receive the premiums, and when the premium fell due on the 13th day of August, 1861, Borum had the money to pay it, and would have paid it if he had had the renewal receipts signed by the President, to be countersigned by him, on payment of the premiums, which the company had always before furnished its agent, and which, according to all previous usage, it was its duty to furnish, and without which, he was powerless to collect, and as to collection of premiums, in a situation as if he never had been agent.

According to the proofs, nothing but the want of these renewal receipts prevented the punctual payment of the premium, (the agent, according to the proof, having no right to give any receipt but only to countersign such as were furnished by the company, signed by the proper officer). But it is argued that it was, nevertheless, the duty of White, or his agent, to make the tender, although the agent of the company had no right to receive it (although without such renewal receipt, he had no authority to collect, and as to this, was as if he had never been agent at all).

This might have been so if White had had a different agent who did not know that Borum could not collect, or was not himself informed of the inability of the company's agent to collect. But suppose white had had some other agent who had gone to Borum to pay the premium, with the money in his pocket to do it, and Borum had have informed him that he could not receive payments, and had no right to do so for the want of the proper renewal receipts, what use would there have been of this agent's going through the vain form of making an offer which he knew could not be acceded to, and would be rejected? I do not suppose it will be contended that he would have been compelled to go through an idle form in such a case; if not, why should Borum (who both as agent for the company, and as agent for White, knew he could not receive it) have gone through the mere form and mockery of making a tender, as agent for White, of the money he had in his pocket to pay it, to himself as agent of the company, when he had no right to collect it, and could not receive it. Yet the pantomime must have gone to this absurdity, if the position taken by the counsel of the company on this question is a correct one. I do not think a formal tender was essential or necessary under these circumstances, or that any party was injured by its not being made. Nor do I think that any one was or could have been injured by the failure to make, or even was bound to make, a tender to one who had no right to receive.

But suppose this is a New York, and not a Virginia contract, how does that help the case of the Company? It certainly can not do it, unless this was such an executory contract as was dissolved by the occurrence of the late war (between the Confederate States and the United States) after the contract had been made and performed on the part of the assured in a great measure, and to the full extent its stipulations required performance at the time the war broke out. And this brings us to the consideration of the proposition, upon which the case hinges, as to whether this is such a contract as would be dissolved by the rules of public law upon the breaking out of a war, between the countries of the two contending parties. By the rules on this subject, all contracts made between citizens or subjects of the belligerent powers during hostilities and all executory contracts requiring intercourse and concert in action, counsel and confidence between the citizens of the different powers, in order to carry it on, such as partnership and the like, in which there is a community of goods and interests are, for very obvious reasons, void. But where these objections do not exist, I can see no reason why a contract, lawful in its inception, and partly (and to the full extent its terms required) executed before the war, and which to continue during its existence, did not require any intercourse with the enemy, more than that of an ordinary contract between debtor and creditor in the ordinary course of business, should be declared void, and a forfeiture visited on one of the parties to enure to the benefit of the other, for having done what was perfectly proper and lawful when it took place.

Why should White be made responsible for the war more than the other party? and why should his lawful vested rights be forfeited and transferred to the other party merely because a war existed between the respective States in which they were domiciled? I can perceive no good reason for it, and I think the courts, instead of encouraging technical forfeitures for matters of form which do not affect the merits and substance of the matter of the contract, ought, on the contrary, to be astute to find reasons for preventing such forfeitures.

I do not think there is any difference between the contract to pay the premiums on the life insurance policy in this case, periodically, than any other contract to make payments at certain periods, some of which happened to fall due in the time of a war that afterwards took place—in such case the payments falling due during the war would be suspended, and the right to recover them would revive as soon as peace was restored.

In the case under consideration, the company agreed to pay to White's representative \$1,500 at his death, upon condition that he made certain annual payments to them as long as he lived; and if he failed to make any of these payments, he forfeited his right to the policy and all the money previously paid by him at any of the stipulated periods. White paid in addition to the advance premium, those that fell due in 1858-9 and 1860, (four in all) and was prevented from paying the other in consequence of the then existing war. Now, shall he be made responsible for the war, and compelled to forfeit the money that he had rightfully paid before it occurred, and that too to his enemy? or shall the performance of the contract be suspended during the war?

I think there can be no good reason why this contract should not be suspended, as well as any other, by whose terms one belligerent party was required by a previous contract to pay to another money that became due during the war. Upon a common bond to pay money periodically, if any of the payments fell due during a subsequent war the bond would not have become void, but the payment would have been suspended until after peace.

And so in this case. White's right to pay, and the company's right to collect the premium, were suspended during the war, but immediately revived when peace was restored. Suppose White had died seven days sooner than he did, there would have been no premium to pay, and the company would have been bound to pay the \$1,500. Yet it could not have been collected until a reasonable time after peace was restored.

In my view of the case, the rights of the parties are not affected; and it does not matter, so far as the validity of it is concerned, whether this was a Virginia contract or not. But it stands upon the broader foundation that it is of that class of contracts which are not dissolved, but only suspended, by a subsequent war. This view is fully sustained by recent decisions in the Court of Appeals of Kentucky, in a case of this same *New York Life Insurance Co. v. Clopton*, 7 Bush., 179, and by a very able and carefully prepared opinion by Judge Blatchford, of the Circuit Court of the United States for the Southern District of New York, in the case of *Hamilton, ex'r of Goodman, v. The Mutual Life Insurance Co. of New York*, in which he reviews all of the cases, and especially the recent decisions on the subject (among them *The Manhattan Life Insurance Co. v. Warwick*), in which he approves the decision of the majority of the court. In that case he maintains that as by the public law the insurance company could not receive, any more than the assured could lawfully pay, the premiums during the war, and where the company was so incapacitated by law from receiving, it had the same effect upon the contract as if the assured had offered to pay and the company had refused. In speaking of the nature and character of such contracts, he says: "The cases in the books which are cited on the part of the defendants as enforcing strictly the rule that a precedent condition on which by contract money is to be paid must be absolutely complied with, were cases in which the impediment to performance existed solely on the part of him who was to be the actor in performance, and were not cases in which the impediment existed either solely on the part of him who was to be the recipient of performance, or was an impediment to both parties jointly and equally in extent. The distinction," he adds, "is a sound one, and it would be gross injustice to apply to this case (one like that now under consideration) a rule the reason of which has no application to it. It would be for the defendants, in effect, to say to Goodman, it was unlawful for us to receive from you your premiums; it would have been idle for you to have tendered them to us; yet, as the contract was, that if you did not pay, or tender them, at the times specified, the contract is forfeited, and our liability to pay you the \$5,983 is at an end. And besides that, the \$2,300 paid to us in 1849 and 1858 is forfeited to us." And he continues: "I do

not believe a defense of that kind to a policy of life insurance, situated like the present one, was ever allowed by a court of justice in any civilized community."

If this was a Virginia contract to be performed here, and Borum was the agent of the company to whom White was bound to make payment, he was justified in not making a formal tender, from the facts above stated in relation to it (though, I think, he was not agent in this respect, because the company failed to furnish him with the proper authority to collect and grant receipts). If he was not such agent, and his powers were revoked by the defendants withholding from him the renewal receipts necessary to enable him to collect the premiums, then it was unlawful for White to pay, and likewise unlawful for the company to receive payment at his hands (they being technical enemies), and White stood excused by the rules of public law from making the tender during the war.

I do not think the court erred in refusing to give the first instruction asked for by the defendants, as that proposed to instruct the jury that a failure to pay, or make a tender of the premium which fell due on the 13th of August, 1861, was a forfeiture of the policy under all circumstances, and for which there could be no excuse. By the second instruction, as propounded by the defendants, the court was asked to instruct the jury "that unless they believed from the evidence that due notice and proof of the death of John S. White was forwarded to the defendants at least sixty days before the institution, they must find for the defendants," which the court gave with the following addition, viz: "Unless they further believe that the defendant waived such notice and proof of death." I think the court did not commit any error in making this second *exception*, as it was proved that the defendant, when informed of the death of White, in December, 1862, had declared its determination not to recognize its obligation under the policy, or to make any payment on account of it.

Nor do I think there was any error in overruling the motion for a new trial, except that the court ought to have put the plaintiff under a rule to abate the verdict by the amount of the premium which fell due on the 13th of August, 1861, but this may be corrected here. I am in favor of affirming the judgment, corrected in this respect.

[A copy—*teste*.]

GEO. L. CHRISTIAN, Clerk.

The opinion was unanimous—McLaughlin and Barton, J.J., concurring.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

Planters' Bank of Tennessee, Plaintiff in Error.

VS.

The Union Bank of Louisiana,

AND

Union Bank of Louisiana, Plaintiff in Error,

VS.

The Planters' Bank of Tennessee.

In error to the Circuit Court of the United States for the District of Louisiana.

1. A. a bank doing business in the State of Tennessee, had, prior to September, 1863, remitted to B., a bank in the City of New Orleans, La., large sums of "Confederate treasury notes," and had also forwarded them drafts and other claims for collection, it having been understood between them that the drafts and claims thus forwarded were payable only in such Confederate currency, and all the collections made on account of A. were made in that currency, with his knowledge and authority.
2. On the 17th of August, 1863, by command of Major General Banks, an order was issued requiring the banks in New Orleans to pay over to the Chief Quartermaster of the army all money in their possession belonging to any corporation, etc., in hostility to the United States, etc. Under this order, B., on the 10th of September, 1863, paid to the Quartermaster the balance standing to A.'s credit on his books. The payment was made in Confederate notes.
3. Held, that A. was entitled to recover only the damages sustained by him in consequence of B.'s failure to deliver Confederate notes when they were demanded, and those damages are to be measured by the value of those notes in United States currency at the time when the demand was made.

Mr. Justice STRONG delivered the opinion of the Court.

This was an action brought by the Planters' Bank of Tennessee against the Union Bank of Louisiana to recover an alleged balance of account. A verdict and judgment having been rendered for the plaintiff, both parties have removed the case to this court by writs of error. From the record it appears that, some time prior to September, 1863, the plaintiffs and the defendants had commercial dealings with each other, the nature of which, as the evidence tends to prove, was as follows: The plaintiffs had remitted to the defendants large sums of "Confederate treasury notes," and had also forwarded to them drafts and other claims for collection, it having been understood between them that the drafts and claims thus forwarded were payable only in such Confederate currency, and all the collections made on account of the plaintiffs were made in that currency, with their knowledge and authority. It was thus that the entire balance in favor of the plaintiffs was made up. There appears to have been no controversy over these facts.

But among the defences set up at the trial of the case was an alleged payment to the military authorities of the United States, then in military possession of New Orleans. It appeared that on the 17th of August, 1863, by command of Major General Banks, an order was issued requiring the several banks and banking associations

New Orleans to pay over without delay to the chief quartermaster of the army, or to such officer of his department as he might designate, all money in their possession belonging to, or standing upon their books to the credit of any corporation, association, or pretended government in hostility to the United States, and all moneys belonging to, or standing on their books to the credit of, any person registered as an enemy of the United States, or engaged in any manner in the military, naval, or civil service of the so-called Confederate States, or who should have been, or who might thereafter be convicted of rendering any aid or comfort to the enemies of the United States. The order declared that such funds would be held and accounted for by the quartermaster's department, subject to the future adjudication of the government of the United States. Under this order the defendants, as the evidence tended to show, on the 10th day of September, 1863, paid to the acting quartermaster the balance standing to the plaintiffs' credit on their books, being the whole balance due. The payment was made in Confederate notes, and the quartermaster accepted them in discharge of the balance. Whether this was a satisfaction of the claim of the plaintiffs upon the defendants is a controlling question in the case. The Circuit Court instructed the jury that it was not, because payment was made to the quartermaster in Confederate notes, which the court was of opinion he had no authority to receive, though holding that the military authorities thus exacting payment were invested with all the rights of a creditor.

It might be difficult to maintain, if the military authorities were clothed with the rights of creditors, that is, if they had succeeded to the position and title of the plaintiffs, that they could not determine what funds they would receive in payment of the balance on the defendants' books to the credit of the plaintiffs. It is not perceived why they could not accept Confederate notes in discharge of a debt which had become due to them. But a grave question lies back of this. Did the order of General Banks justify any payment of the balance to the military authorities? If it did not, it is immaterial in what currency the payment was made. Payment in any currency was no protection to the debtors. The validity of the order is, therefore, the first thing to be considered. It was made, as we have seen, on the 17th of August, 1863. Then the city of New Orleans was in quiet possession of the United States forces. It had been captured more than fifteen months before that time, and undisturbed possession was maintained ever after its capture. Hence the order was no attempt to seize property "*flagrante bello*," nor was it a seizure for immediate use of the army. It was simply an attempt to confiscate property which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war. Still, as the war had not ceased, though it was not flagrant in the district, and as General Banks was in command of the district, it must be conceded that he had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or by the effect of congressional legislation. A pledge, however, had been given that rights of property should be respected. When the city was surrendered to the army under General Butler, a proclamation was issued, dated May 1, 1862, one clause of which was as follows: "All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." This, as was remarked in the case of *The Venice*, 2 Wall., 258, "only reiterated the rules established by the legislative and executive action of the national government in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union." That action, it was said, indicated the policy of the government to be, not to regard districts occupied and controlled by national troops as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies.

Substantial, complete, and permanent military occupation and control was held to draw after it the full measure of protection to persons and property consistent with a necessary subjection to military government. We do not assert that anything in General Butler's proclamation exempted property within the occupied district from liability to confiscation as enemies' property, if in truth it was such. All that is now said is that after that proclamation private property in the district was not subject to military seizure as booty of war. But admitting, as we do, that private property remained subject to confiscation, and also that the proclamation applied exclusively to inhabitants of the district, it is undeniable that confiscation was possible only to the extent and in the manner provided by the acts of Congress. Those acts were passed on the 6th of August, 1861, and on the 17th of July, 1862. No others authorized the confiscation of private property, and they prescribed the manner in which alone confiscation could be made. They designated government agents for seizing enemies' property, and they directed the mode of procedure for its condemnation in the courts. The system devised was necessarily exclusive. No authority was given to a military commandant, as such, to effect any confiscation. And under neither of the acts was the property of a banking institution made confiscable. Both of them had in view the property of natural persons who were public enemies, of persons who gave aid and comfort to the rebellion, or who held office under the Confederate government, or under one of the States composing it. In no one of the six classes of persons whose property was by the act of 1862 declared subject to confiscation, was an artificial being included. It is, therefore, of little importance to inquire what, under the general laws of war, are the rights of a conqueror, for during the recent civil war the government of the United States asserted no general right in virtue of conquest to compel the payment of private debts to itself. On the contrary, it was impliedly disclaimed, except so far as the acts of 1861 and 1862 asserted it. Those enactments declaring that private property belonging to certain classes of persons might be confiscated, in the manner particularly described, are themselves expressive of an intent that the rights of conquest should not be exercised against private property except in the cases mentioned, and in the manner pointed out. And it is by no means to be admitted that a conquering power may compel private debtors to pay their debts to itself, and that such payments extinguish the claims of the original creditor. It does indeed appear to be a principle of international law that a conquering State, after the conquest has sub sided into government, may exact payment from the State debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compellable to pay again. This is the doctrine stated in Phillimore on International Law, vol. 3, part 12, ch. 4, to which we have been referred. But the principle has no applicability to debts not due to the conquered State. Neither Phillimore nor Byndershoek, whom he cites, asserts that the conquering State succeeds to the rights of a private creditor.

It follows then that the order of General Banks was one which he had no authority to make, and that his direction to the Union Bank to pay to the quartermaster of the army the debt due the Planters' Bank was wholly invalid. This makes it unnecessary to consider in detail the exceptions taken by the defendants to the rulings of the Circuit Court, respecting the order and the alleged payment under it; for if the order was invalid, payment to the quartermaster did not satisfy the debt.

It is further assigned for error by the defendants, that the court allowed the plaintiffs to withdraw a *remittitur* entered by them of part of a verdict obtained on a former trial of the case. The only objection made in the court below to the allowance was, that the *remittitur* was an acknowledgment of record that the amount remitted was not due. There had been a former trial in which the plaintiffs had obtained

judgment for \$113,296.01, with five per cent. interest from November 25, 1863. This was a larger amount of interest than the petition of the plaintiffs had claimed, and they entered on the judgment a *remititur* of the excess, expressly reserving their rights to the balance of the judgment. Subsequently a new trial was granted, and it is now contended that the *remititur* had the effect of a *retrazit*. As it was entered after judgment, such would perhaps be its effect if the judgment itself had not been set aside and a new trial had not been granted.—(*Bowden v. House*, 7 Bingh., 716.) But such can not be its operation now. If it takes effect at all, it must in its entirety, and the plaintiffs must hold their first judgment for the balance unremitted. As that judgment no longer exists, there is no reason for holding that the remission of a part of it is equivalent to an adjudication against them. This assignment of error is, therefore, not sustained.

Another error assigned by the defendants is, that the court ordered execution to issue on the judgment first recovered for the sum of \$26,752.63, without prejudice to the plaintiffs' rights to recover the balance, that amount having been admitted to be due, and that this was done before the motion for a new trial was disposed of. It must be admitted that though there was a judgment in existence, the order of an execution at the time it was made was anomalous. But there does not appear to have been any objection to it, and it is not shown that the defendants have sustained any injury in consequence of its issue. It may fairly be presumed that the defendants assented to the order, and admitted that the sum for which the execution was directed was due. The new trial afterward granted was limited to the controversy respecting the excess of the claim over \$26,752.63, which, as the order stated, "was admitted by the defendants to be due the plaintiffs."

The only remaining errors assigned by the defendants which require notice, grow out of the refusal of the court to charge the jury as requested, that if they found the balance of account sued for was composed wholly or in part of direct remittances from the plaintiffs to the defendants of Confederate treasury notes, and of collections of drafts payable and paid in such notes, and if they found that the banks were necessary instruments of the Confederate government for putting its issues of Confederate notes in circulation and forcing them upon the country, and that the plaintiffs, as one of the banks, willingly lent itself as an instrument of that government, then the plaintiffs could not recover such amount of the balance thus composed of treasury notes and collections. The point, it will be observed, does not assume that the plaintiffs were willing agents, or agents at all of the Confederate government in putting into circulation the notes which went to make up the balance of account standing to their credit. It assumes only that they had, as such agents, put some of the issues of the government into circulation, at some time, in some transaction with some person, not necessarily the defendants. That assumption, had it been sustained by the finding of the jury, was wholly impertinent, and, therefore, the only relevant question presented by the point was, whether Confederate treasury notes, had and received by the defendants for the use of the plaintiffs, were a sufficient consideration for a promise, express or implied, to pay anything. After the decision in *Thorington v. Smith*, the point could not have been affirmed. A promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, can not be considered a *nudum pactum*, or an illegal contract.

Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or

against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it, may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. Thus, in *Faikney Reynous*, 4 Burrows, 2,069, a plaintiff was allowed to recover in an action on a bond given by a partner to his co-partner for differences paid in a stock-jobbing transaction prohibited by act of Parliament. This was the case of an express agreement to pay a debt which could not have been recovered of the firm. *Petrie v. Hannay*, 3 Tenn., 419, was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his co-partner for contribution was sustained. This was an action on an implied promise. *Ex-parte Bulmer*, 13 Ves., 316, goes much farther, and perhaps farther than can now be sustained. We are aware that *Faikney v. Reynous* and *Petrie v. Hannay*, have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court. (*Armstrong v. Toler*, 11 Wheat., 258; *McBlair v. Gibbs*, 17 How., 246; *Brooks v. Martin*, 2 Wall., 70.) *Lestapiés v. Ingraham*, 5 Barr., 71, is full to the same effect. See also *Farmer v. Russell*, 1 Bos. & Pull., 295. We think, therefore, the court was not in error in refusing to affirm the defendants' points.

No more need be said respecting the exceptions taken and errors assigned by the defendants below. None of them are sustained.

A single assignment of error made by the plaintiffs below remains to be considered. At the trial they asked for the following instruction: If the jury should find from the evidence that the defendants received Confederate currency on behalf of the plaintiffs, and entered it to the credit of the plaintiffs on the books of the bank, and used it in their general business, the defendants thereby became the debtors of the plaintiffs, and that the measure of the indebtedness was the value of Confederate currency in the lawful money of the United States at the time the credit was entered and the collections were made.

This instruction the court declined giving, but in lieu thereof charged the jury that the measure of indebtedness for receipts, or collections, made by the defendants in Confederate currency and used by them in their general business, was the value of such currency at the date of demand of payment made by the plaintiffs, and not at the date when such currency was received and used by the defendants in their business. This refusal to instruct the jury as requested, and the instructions actually given are now complained of as erroneous. We think, however, they were correct in view of the assumed and conceded facts. We do not controvert the position that generally a bank becomes a debtor to its depositor by its receipt of money deposited by him, and that money paid into a bank ceases to be the money of the depositor and becomes the money of the bank which it may use, returning an equivalent when demanded, by paying a similar sum to that deposited. Such is undoubtedly the nature of the contract between a depositor and his banker. So also a collecting bank ordin-

arily becomes the owner of money collected by it for its correspondent, and consequently a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in legal value.

But it is to be observed this is the rule where money has been deposited, or collected, and when there has been no contract or understanding that a different rule should prevail. The circumstances of the present case are peculiar. It seems to have been conceded in the court below that the deposits were made in Confederate currency and that the collections were made in like currency with the assent of the plaintiffs. The instructions asked of the court assume this. The Union Bank then became the agent of the plaintiffs to receive and collect, not money, but Confederate notes, or promises, and the obligation it assumed was to pay Confederate notes when they should be demanded. The subject of the contract was a commodity, not money, and there was no default in the Union Bank until a demand was made and refused. And from the nature of the transaction it is to be inferred that the intent of the parties was that the one should impose and the other assume only a liability to return to the plaintiffs notes of the Confederate government like those received, or collected; notes promising to pay a like sum. And it is not perceived that the effect of the assumption is changed by the fact that the defendants used the notes received in their general business, if they did use them, prior to any demand for the fulfillment of their undertaking. Such use was in contemplation of the parties from the beginning. In *Robinson v. Noble's Administrators*, 8 Peters, 181, a promise to pay in Cincinnati at a certain time, "in the paper of the Miami Exporting Company, or its equivalent," was held by this court to impose upon the promisor only a liability to make good the damages sustained through his failure to pay at the day, and that those damages were measured by the market value of the paper at the time when payment should have been made. The promise was assimilated to an engagement to deliver a certain quantity of flour, or any other commodity, on a given day. A loan for consumption to be returned in kind contemplates a restoration not of the identical thing loaned, but of a similar article equal in quantity; and if no return be made, all that the lender can require is the value of the thing which should have been returned at the time when the contract was broken. The value at the time of the loan is not to be considered. Both parties take the risk of appreciation, or depreciation. Why should not a similar rule be applied to the present case? Ought the plaintiffs to recover more than the damages they have sustained from the breach of the contract? Ought they to be placed in a better position than that they would occupy if the defendants had paid them the right quantity of Confederate notes when they were demanded? We think not. Clearly if the notes had appreciated after they were received by the defendants, and before the demand was made, the plaintiffs would have been entitled to the benefit of the appreciation. This is because of the nature of the transaction, and it would seem, for the same reason, the risk of depreciation was necessarily theirs.

This case differs very materially from *Marine Bank v. Fulton Bank*, 2 Wallace, 252. There, it is true, the collecting bank received depreciated currency of the Illinois banks, and, it may be assumed, with the assent of its correspondent. But there were positive instructions to hold the avails of the collections subject to the order of the bank which had sent the notes for collections; and the proceeds of the collections were an authorized lawful currency. The two banks, therefore, stood to each other in the relation of debtor and creditor, and the collecting bank acknowledged that relation immediately on the payment of the notes which had been sent to it for collection. Not so here. The collections were not made in

money, and it was not the understanding of the parties that money be paid. We hold, therefore, that the Planters' Bank ought not to be permitted to recover more than the damages sustained by it in consequence of the defendant's failure to deliver Confederate notes when they were demanded, and those damages are measured by the value of those notes in United States currency at the time when the demand was made and when the notes should have been delivered; and in so holding, we do not intend to deny or qualify the doctrine asserted in *Marine Bank v. Fulton Bank*, or in *Thompson v. Riggs*, 5 Wall., 663. It follows that the charge given to the jury was correct.

There is, then, nothing in the record complained of by either party which would justify our ordering a new trial,

The judgment is affirmed.

BOOK NOTICES.

Wharton and Stille's Medical Jurisprudence. Third edition. Vol. I. Kay & Brother. Philadelphia, 1873.

In a former number of this REVIEW we acknowledged the receipt of the first volume of this valuable work, devoted to the treatment of "Mental Unsoundness and Psychological Law," and promised a more extended notice than the lateness of its reception would at that time admit of. From the examination we have since been able to give it, we think there is good reason to congratulate not only the profession for whose use it is designed, but also the country at large, for the issuance of this third edition, though, since the second edition of the work, the plea of insanity in criminal cases has become so frequent and so liable to be abused, that a more thorough treatment of the subject became necessary, and in conforming to this requirement in a work so complete and comprehensive, we are not quite sure but that the work before us ought to be regarded as substantially a new one. The improvement upon the last is certainly more than considerable.

Though a good portion of the present volume is devoted to an examination of what would constitute such "mental unsoundness" as to render void a contract or a will, yet the predilection of one of the distinguished authors for criminal law leads him to dwell upon the subject, as applied to that branch of jurisprudence, at greater length. And to a right good purpose has he done so, for it is in this very branch that most difficulty arises; that the plea is examined with more acuteness, owing, we suppose, to the fact that life and liberty are more highly prized than property.

Crimes of a very heinous nature are oftentimes committed without any apparent cause. The proof of the commission, too, is sometimes so clear, and the deed attended with so few extenuating circumstances, that the *facts* in justification are not relied on, but a certain condition of the perpetrator's mind at the time the crime was committed, rendering him irresponsible for his conduct, is pleaded. We have had cause within the last few years, either to lament the frightful increase in this malady of insanity, or else the frequency and readiness with which frightened criminals, fully awakened to the punishment due for their merciless deeds, avail themselves of this defense before a pitying jury. That this proportional increase in the disease has taken place, we do not believe the statistics will show, and hence we are forced to conclude that this plea has been much abused.

It is certainly not our wish, nor do we believe it to be the desire of any well-disposed class of persons to deprive any being, suffering from this painful disease, of whatever protection, in the eye of the law, it may afford him on his trial for crimes committed while under its influence. But in the examination of some late celebrated cases where this defense was relied on, we could not refrain from protesting seriously against the character of evidence introduced in support of the plea. Scientific experts, remarkable alone for their eccentricity in maintaining their peculiar doctrines in regard to the liability of man's mind to weakness and error, offer themselves for examination on the trial, simply to gain for themselves and their creeds a certain fame. And this they do, but in the minds of skeptical and honest men, it marvellously resembles infamy. Indeed it was long ago indignantly remarked that there was no principle so absurd but that there might be found some who would contend for its truth.

Our authors, in the preface to the present volume, give a brief and highly interesting history of the gradual softening of the treatment rendered to the unfortunates who suffer from this disease, showing the change from the excessive harshness they once received to the very great leniency and care now bestowed upon them.

So comfortably indeed are they now provided for in most of the States, that we can not but believe it to be a right and proper judgment, that upon an acquittal of a crime for this cause, the party acquitted having been proven to be a dangerous character, should at once be confined in the asylum provided for insane persons, and there receive the treatment to which as such person he is entitled. And no plea afterwards of "lucid interval" should in such case serve to release him; for who can tell when his frenzy may again break out in another murder?

The advantages rendered to the profession in the clear manner in which the law is stated, and the large number of adjudicated cases cited, no less singular than interesting, must of necessity be great. The attractive style in which the book is gotten up will render this examination a pleasure.

A Concise and Practical Treatise of the Law of Vendors and Purchasers of Estates. Fourteenth edition. By Edward Sugden (Lord St. Leonards). Eighth American edition. By J. C. Perkins, LL. D. 2 vols. Kay & Brother, Philadelphia.

This well-known treatise needs no commendation at our hands. We quote the language of its eminent author in his preface to the 13th English edition, in which he describes the history of its publication and success: "Determined at my outset in life to write a book, I was delighted when I hit upon the subject now before the reader—the Law of Vendors and Purchasers. The title promised well, and many portions of the law had not previously been embodied in any treatise. Modern law treatises were indeed few at that period. When this work was announced for publication, nearly the universal opinion was that it would be a failure, as the subjects to be considered were too multifarious for one treatise. Nothing dismayed, I labored diligently, and, with the aid of Lincoln's Inn Library, in which a considerable portion of the book was written,—for my own shelves were but scantily furnished—I at length finished the work in its original shape. My courage then failed me. The expense of publication was certain, and success, I thought, more than doubtful; and it was not without some difficulty that I could be persuaded to refrain from committing the manuscript to the flames, and to join with a bookseller in incurring the risk of publishing it at half profit and loss, as it is termed. As soon as the book was printed, another bookseller bought my interest in the edition, and thus relieved me from my obligations. The amount I received as the price of the edition was small, but I have never since received any sum with anything approaching to the same satisfaction. The book was certainly the foundation of my early success in life. It was published in February, 1805, and the edition was sold at once. The second edition, which was in royal octavo, greatly enlarged, was published on the 1st of June, 1806. Both these editions were published before I was called to the Bar. The next, the third edition, was published in 1808, and it was the first which was divided into sections, with the *placita* numbered. The fourth was published at the end of November, 1813; and in the advertisement prefixed to it I alluded to the difficulties of preparing it from the great accumulation of cases, and intimated the probability that I should not be able to undertake any further edition. Nevertheless, the previous labors were forgotten, and new editions continued to appear: the fifth in September, 1818; the sixth in June, 1822; the seventh in May, 1826; the eighth in January, 1830; the ninth in May, 1834, in two vols., royal octavo; the tenth—with numerous

additions—in November, 1839, in three vols., royal octavo; the eleventh in May, 1846, compressed into two volumes; the twelfth in June, 1851, reduced into one common octavo volume. . . . When the present edition was called for, I determined to restore the work to its original shape as a treatise and at the same time to preserve its character as a concise and practical view. To accomplish this object, I have spared neither time nor labor. The last edition contained some 500 cases which were not quoted in the eleventh edition, and upwards of 1,200 cases are included in this edition which were not in the twelfth. . . . The reader will bear in mind that this collection of cases is the fruit of upwards of half a century of research and labor. Every case cited I have perused in the original report, and every line of the book has been written by myself."

This was written in January, 1857. In his preface to the fourteenth edition, November, 1862, the author says: "It seems scarcely credible that one thousand cases should be quoted in this, which were not in the last edition."

In the words of the American editor: "The work contains a thorough discussion and an elaborate statement of all the points of law and principles of equity pertaining to agreements for the sale and purchase of real estate. The formation of the contract—its validity—the evidence that may be introduced to affect—the modes of rescinding or enforcing it, and the remedies, both at law and in equity, on a breach of it, have each been treated by the author with sufficient amplitude and with great accuracy, clearness and force. No treatise contains more instruction and reliable learning on the subject of specific performance."

The American notes are full, and, of course, render this justly celebrated work doubly valuable to the lawyers of this country.

The Law of New Trials, and other Rehearings, &c. By FRANCIS HILLIARD. Philadelphia: Kay & Bro., Law Booksellers, Publishers and Proprietors, 19 South 6th street.

This is the second edition of this work, reviewed and greatly enlarged, the first having been published, if we mistake not, in 1866. We are much pleased with the author's arrangement of the work.

The first chapter is devoted to the definition of the term "New Trial;" gives its history; shows its importance; the mode of procuring it, and the form of proceedings by which it is sought and obtained. The second treats of the grounds of new trial, under which caption are considered the general grounds of new trial, which consist of errors of a judge in matters of law, or of a jury in matters of fact, and in either case matters foreign to the record. The third chapter is a continuation of the same subject. The fourth treats of the terms of granting new trials. The fifth of the nature and effect of the motion and the granting of the same, together with points of practice and successive new trials; and the sixth of waiver. The seventh chapter is devoted to the important subject of new trials in criminal cases, which, in view of the recent rulings of New York courts, is especially interesting to the profession at this time. Indeed, we can heartily recommend to that class of the profession who practice in the criminal courts, all that portion of this admirable treatise relating to the rules by which courts are governed in granting a re-hearing in cases affecting the life or liberty of the citizen. The author next details the various grounds upon which a new trial may be had, and that part of his work from the eighth to the eighteenth chapters contains an elaborate statement of such grounds which, for the want of space, we are unable to notice at greater length. "New Trials in Equity" is the subject of the eighteenth chapter, and the remainder of the work treats of other

forms of re-hearing other than new trials, such as *writ of error*, *certiorari*, *appeal*, *mandamus* and *audita querela*. The general rules of law upon the subject of new trials have been modified to a limited extent by express statutes. The leading statutory provisions of the several States are contained in an appendix to the work. To this edition numerous cases have been added, enlarging the volume by one hundred and fifty pages.

American Corporation Cases. Embracing the Decisions of the Supreme Court of the United States, the Circuit Courts of the United States, and the Courts of Last Resort in the several States since January 1, 1863, of questions peculiar to the Law of Corporations. Edited by THOMAS F. WITHEROW. Vol I. Published by E. B. Myers & Co., Chicago. Large 8vo. Price, \$7.50.

The head-notes to the decisions contained in this volume are admirable, as is also the index. The work itself is indispensable to every practicing lawyer, for the reason that it will, not only in individual cases, save him great labor and research, but will also enable him, better even than any text book with fullest notes, to clearly conceive the law as it is at present on this most important subject. Its mechanical execution is also, as are, in fact, we believe, all the publications of this firm, admirable.

The Law of Procedure. The Chancery Jurisdiction and Practice, according to Statutes and Decisions in the State of Illinois, from the earliest period to 1873. Exemplified by a complete record in Chancery, as evolved in a suit which was pending in the Federal Courts for more than a quarter of a century, with its collateral suits in the High Court of Chancery and the Court of Exchequer in England, contrasted with records in Illinois and under the New York Code of Procedure, showing the practice from the filing of the bill to full discharge and satisfaction of the record. With an appendix of forms. By EDWARD JUDSON HILL, author of the "Common Law Jurisdiction and Practice," &c. Published by E. B. Myers & Co., Chicago. Complete in one large octavo volume of over 800 pages. Price, \$7.50.

This work has evidently been quite systematically and carefully constructed, and will prove of great practical assistance to practitioners in all the States. It is handsomely printed and bound.

A Digest of the Illinois Reports, embracing all the Decisions of the Supreme Court of the State from its organization to the fifty-fourth volume, inclusive, with Table of Cases and Cases Criticised. By CHARLES H. WOOD and JOSEPH D. LONG, of the Illinois Bar. In two volumes. Royal 8vo. E. B. Myers & Co., Chicago. Price, \$15.

The paper, type and binding used in the execution of this work are very superior. One is at once struck with the handsome and solid appearance it presents, certainly unsurpassed in this respect by any law publication we have ever seen.

The editors seem, from the examination which we have made, to have done their work carefully and well. And in this day, when so much respect is paid by courts to the citation of authorities, and text books are seemingly chiefly useful on account of voluminous references to decisions *pro* and *con*, we don't know but that the practitioner would do well to give a place in his library to the digests of the different States. The decisions of the Supreme Court of Illinois rank high, and are often cited and treated with great respect by the courts of other States.

A Selection of Leading Cases on Mercantile and Marine Law. With notes. By OWEN DAVIES TUDOR, of the Middle Temple, Esq., &c. From the second London Edition. With additional Notes and References to American Cases by George Sharswood. Two Vols. Philadelphia: T. & J. W. Johnson & Co.

In our opinion, in every respect better, both for student and practitioner, than any text book on the same subjects could possibly be. The cases are admirably selected, and the notes to each, English and American, exhaustive. No publishing house excel the Messrs. Johnson in the neatness and excellency of the execution of their publications.

Reports of Cases Argued and Determined in the Supreme Court of Judicature of the State of Indiana. By JAMES B. BLACK, Official Reporter. Vol. XXXVI.

Many of the cases reported in this volume are of general interest. The opinion in the case of *Whitem v. The State*, is quite exhaustive and interesting. One Emily J. Risk, by next friend, had instituted an action for seduction in the Jefferson Circuit Court, against Whitem, and while the cause was still pending, the attorneys for the plaintiff alleged, in open court, that they were informed that their client had been abducted by the defendant, whereupon an attachment was issued and Whitem brought into court to answer for a contempt. The law of direct and constructive contempt is fully inquired into. The court, among other points, held that an appeal would lie in all cases of contempt, overruling *The State v. Tipton*, 1 Blackf. 166.

The index is very full and satisfactory, and evidences careful preparation on the part of the Reporter.

Report of the Examination of Law Students for Admission to the Bar in the Supreme Court of Illinois at the January Term, 1873. By MYRA BRADWELL. Chicago: Price, \$1.00.

To those contemplating an application for admission to the Bar, this little book will prove of quite considerable interest, and to such we highly recommend it.

We have received and read with great pleasure the learned and profound argument of R. W. Woolley, Esq., attorney for defendant, in the case of *The Louisville Railway Transfer Co. v. William Johnston*, in which the law of *ad quod damnum*, and its history, is thoroughly traced and applied. We would like to be able to state several of the points made, and the reasoning and authority by which they are fortified, but our space will not permit.

We are under special obligations to Quent. Busbee, Esq., of Raleigh, N. C., for advance sheets of 68 N. C. Reports.

Our thanks are due to Hon. John M. Shirley, State Reporter for the State of New Hampshire, for advance sheets of 52 N. H., and for many former favors which should have been acknowledged before.

NOTES.

The following questions were propounded by Professor JOHN W. BROCKENBROUGH, to the Junior and Senior Law Classes of Washington and Lee University, Virginia, and are so suggestive of thought upon the points raised, that we are induced, especially for the benefit of those of our readers who are yet students of law, to reproduce them in this REVIEW. We know of no plan better calculated to excite *thought* among the younger members of the profession; and the only way of obtaining a thorough and accurate acquaintance with the spirit, the fundamental principles, of the law, is to learn to *think* closely thereupon. We have many pettifoggers; but few lawyers or jurists. The spirit and science of the law can only be acquired or imbued (and until acquired no one can properly be said to be a lawyer), by earnest inquiry and thought. The mind must actually, by intense concentration, *fuse* the rudimental principles of this great science, and assimilate them to itself.

SENIOR CLASS.

OF CONTRACTS.—Generally and at Common Law.

What is a contract? 2 Bl. Com., 442. What is the difference between a good, and a valuable consideration? *Ib.*, 444. What form of a contract *conclusively* imports a consideration? *Ib.*, 446, and note 8. Is a *voluntary* bond binding upon the obligor? Is there a difference between a want of consideration and a vicious or illegal consideration?

What is an Estoppel by deed?

Distinguish between an *Implied* and an *Express* contract, and illustrate by examples.

Define a deed. Distinguish between a *deed poll* and an indenture. Is sealing still necessary to constitute a deed? What substitute for the common law seal of wax is supplied by Statute in Virginia? C. V. Ch. 143, § 2 and 1 Mat. Dig. 387, Note 2. If a scroll is used in lieu of a seal of wax, is recognition of the seal in the body of the instrument necessary to constitute it a *good deed*?

Define *consideration*, as an element of a valid contract. Is a voluntary deed valid as between the parties? Is it so as against creditors and purchasers? What do the statutes of 13th and 27th Eliz. provide, and have they been re-enacted in some form or other throughout the United States? C. V., § 118.

What is *fraud per se*? Is the retention of chattels after an absolute conveyance conclusive, or *prima facie* evidence of fraud as against creditors? *Turner v. Davis*, 4 Grat.

OF CONTRACTS GOVERNED BY THE LAW MERCHANT,—OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

What is the custom of merchants, or the law merchant? What is a bill of exchange; what a negotiable promissory note? Who are parties to the first; who to the second? When is a bill of exchange a foreign, when an inland bill? Explain the terms, Drawer, Payee, Drawee, Acceptors of a bill of exchange. Who is primarily liable for the bill before acceptance; who afterwards? When the drawee accepts the bill, how does he express acceptance? What does the law presume from the fact of ac-

ceptance? What is presentment for acceptance; what for payment? If acceptance is refused, what should the *holder* do to fix the liability of the prior parties to him? What is an endorsement of the bill, and why so called? May there be several successive endorsements of the bill, and what is the last endorsee called? In what relation does the last endorser or holder stand to all the prior parties? In what relation do those prior parties stand to each other, and *inter se*? If a bill is accepted and payment is afterwards refused, what should *then* be done to fix the liability of all the prior parties to him? What is *protest* for non-acceptance or non-payment of a foreign bill? By whom should it be presented for acceptance or payment, and if either or both is refused, to whom presented for protest? Who is a *Notary Public*, and what are his functions and duties? What is *notice of protest*; by whom made; to whom and in what time given?

What is a promissory note? Was such note made *negotiable* in England by the statute of 3 and 4 Anne, ch. 9, and subsequent statutes? What is the difference between a promissory note made payable to *order*, and to *bearer*? When is a promissory note negotiable and subject to the law merchant in Virginia? C. V., ch. 144, § 7. What promissory notes for the payment of money are *not negotiable* and are governed only by the Common Law as to assignment thereof? C. V., ch. 145, § 14, 15, 16. What bills and promissory notes are so subject to the law merchant in England—2 Bl. Com., 466, 470? in Virginia—C. V., ch. 144, § 1 to 9 inclusive? See 1 Mat. Dig., 388, 422, and editor's notes *in extenso*.

How do bills of exchange and negotiable instruments of every kind differ from bonds and other choses in actions at common law with respect to the transfer or assignment thereof? Were choses in action assignable *at all* at common law? How was such assignee regarded in *Equity*? In whom was the *legal* title, in whom the *equitable* title? *Garland v. Richeson*, 4. Band. Can the assignee of a note or bond not negotiable, sue on it in his own name in Virginia, as assignee, or, at his election, in the name of the payee or obligor, and for the benefit of the assignee as *relator*? Does he take *subject* to the equities between the prior parties or relieved of them? C. V., ch. 144, § 14.

If *commercial paper* be assigned for value, before maturity, in the usual course of business, to a *bona fide* holder, what sort of title does he take? Are all such equities cut off as against such innocent holder?—*Swift v. Tyson*, 16 Peters; *Valhir v. Zane*, and *Johnson v. Zane*, 11 Grat.

If the transfer be as *collateral security*, does the holder stand in *the shoes* of his endorser, and is he bound by all the equities affecting it, in his hands? *Prentiss & Weisinger v. Zane*, 8 How., 6 Grat.

If fraud in the contract be shown between the prior parties is the *prima facie* presumption of law that the holder paid value for it, thereby repelled, and is the *onus* of proof thrown upon the holder to show that he did in fact pay for it; in other words, was truly a *bona fide* holder for value: *Valhir v. Zane*, 6 Grat.

OF ANCIENT AND MODERN CONVEYANCES.—Of the Ancient Deed of Feoffment and of Modern Deeds under the Statute of Uses—of Tortious and Innocent Conveyances.

What was the ancient deed of feoffment, and how executed? Was an actual livery of seizin of the land itself sufficient to work a transmutation of possession and title, in ancient times, without any deed of feoffment at all? When a tenant for life, or other interest less than the fee-simple, made a conveyance in fee to his alienee, did an actual fee-simple vest in him? Did not such a conveyance in fee violate the implied promise of the feudal tenant that he would not convey a larger estate than his lord had given

him? Did not such a conveyance work a forfeiture of the wrongful estate, and was it not, therefore, called a *tortious* conveyance?

What was the Statute of Uses, and when was it passed? What were *uses*, as contradistinguished from the *legal* estate of the Feoffee to Uses? How was the equitable or beneficial estate of *cetui que use* made, by operation of the statute, to attract or absorb the legal estate of the feoffee? Did the legal estate in fee thus become extinct, and was the *cetui que use* seized both of the legal and equitable estate in fee? Was the fee-simple legal estate thus merged or drowned in the equitable estate?

What were deeds of *bargain and sale*, *lease and release*, and *covenants*, to stand seized to uses, *before the statute*? Could the legal estate of the bargainor, releasor, or covenantor, divest the legal estate without feoffment and livery of seizin? Were they not treated in equity as mere trustees for the benefit of the bargainee, releasee, and covenantee?

Did not the Statute of Uses, by a sort of parliamentary magic, transfer these legal estates to the corresponding equitable estate or use, and did it thus *execute the use*? Did it not execute it to the extent of the actual beneficial or equitable estate, and no farther? If, then, by deed of bargain and sale the bargainor, having only an estate for life, sold the estate in fee, was it not valid only to the extent that the real interest was vested in him? Since there was no forfeiture for the wrong attempted, were they not called *innocent* conveyances in contradistinction from wrongful feoffments divesting the estate, and therefore called *tortious* conveyances? C. V., ch. 116, § 14, Mat Dig. 34, § 14, with notes.

OF MORTGAGE AND TRUST DEEDS.

How does the modern deed of trust to secure the payments of debts differ from the ancient mortgage deed? In form? In substance? In whom is the legal title? What is the legal effect and operation of the deed by virtue of the nominal money consideration expressed in it? If a mortgage or trust deed secure one *bona fide* creditor, is it therefore void as to the rest? Does such a preference vitiate and make void the deed under the recent bankrupt act, made after the passage of the act? 1 Mat. Dig., 566, 74.

When does a mortgage or trust deed take effect as a recorded deed *quoad* third parties? Has it any retrospective operation? Does an absolute deed operate retrospectively, and how long? May a deed of marriage settlement take effect as a recorded deed retrospectively, if recorded within sixty days of its date? Ch. 118, § 7. Will it be void as to the creditors of, or purchasers from, the husband, unless so recorded? *Ib.*, § 11. 1 Mat. Dig., 563, § 11, and notes.

What was the difference at law and in equity where the condition of the mortgage deed to pay the debt on or before the day specified in the deed was broken by failure to pay the debt with exact punctuality? If not so exactly performed, how did the Court of Law treat the relation of mortgagor and mortgagee? How the Court of Equity? Who was the owner of the estates after breach of condition in one or the other forum?

What was the *Equity of Redemption*? Wm. on R. P., 493; 4 Kent, 157, note.

What was this great doctrine of equity? Did it reverse the relation of parties? If the real purpose was the borrowing and lending of money, could the equity of redemption be affected by a special agreement to waive it?

If the mortgage was disguised under the form of an absolute deed, was parol evidence admissible to strip off the disguise and prove that the real purpose was a security of the payment of money *loaned*, and neither an absolute or conditional *sale*? Is such

parol evidence to be regarded as contradictory, or as controlling its operation? Note of Judge Hare to *Thornburg v. Baker*, 1st Lead. Cas. on Eq.; Wm. on R. P., 393, note 2.

Distinguish between a *mortgage* and a *conditional sale*. Is is often a nice one? Is it always a *question of intention*? and is the true character of the contract to be determined by it?

JUNIOR CLASS.

I. Of estates in land, considered with reference to the quantity of interest which the tenant holds therein.

Of *freehold* estates and their several varieties, at Common Law and by Statute.

(1.) Of freehold estates of *Inheritance*.

Define a *freehold* estate. A fee-simple estate of inheritance, *absolute and pure*. Of limited fees, define, a base or qualified fee. A fee-simple conditional, at Common Law. What words were appropriate to the creation of a fee-simple *conditional*? What was the condition annexed thereto? What was the effect of the statute *de donis conditionalibus*; and when and why passed? Into what *two estates* was the fee-simple conditional transmuted by the statute *de donis*? How were estates tail, general or special, subject to be *barred*, by the fictitious proceedings called *Common Recoveries*, and *Fines*? What was the chief purpose of the proceeding by Common Recovery, as a mode of barring estates tail? When specifically applied to an estate tail, was it perfectly effectual? If not so specifically applied, did estates tail continue in full force in England till comparatively modern times? How many estates be barred in England *now*? By what sort of deed, as a substitute for the solemn jugglery of fines and common recoveries, can an estate now be barred in England? Without such conveyance can an estate tail *yet* be barred? Were estates tail imported into our American colonies by the mere force of *usage*, thus obeying the universal law of colonization, as expressed by Virgil:

"Illum in Italiam portans, victoraeque Penates"

Were estates tail thus introduced into the colony of Virginia? How and when were estates tail eradicated in Virginia? Have these fettered inheritances, called estates tail, ceased to exist everywhere in the United States?

What was an *executory devise*? In what three particulars was it distinguished from a contingent remainder? What words were necessary to create a fee tail *by deed*? What words were sufficient to create a *fee tail* by last Will and testament? When was the statute of Wills enacted in England? If an estate in lands was given *by Will* to A. and his heirs, and if he die *without issue*, then to B. and his heirs, what estate did A. take? What B? If the same estate was given, *by deed*, under precisely the same limitations, what estate did A. and B. take respectively? Was the limitation, *by Will*, in the first case put, valid both in favor of A. and B., yet void as to B. in the second place, *by deed*? If so, explain the reason of the discrimination? Is not the limitation to A. equally by *Will* or *Deed*, an express limitation to A. in fee, and can there be a *remainder* to B. after a limitation *by deed*, to A. in fee-simple? Yet, in the construction of Wills, is not greater latitude of construction allowed, to carry into effect the intention of the testator, than in the construction of a deed or common law conveyance? May not the fee-simple limited to A. by the Will be *cut down* or *reduced* to a fee tail, in order that B. may take the estate after the exhaustion of the issue of A?

Then, what is the meaning of the limitation in a Will of estate to A. and his heirs, and if he die *without issue*, then to B. and his heirs? Does it not mean a limitation to A. and the heirs of his body, and is not that equivalent to an express *estate tail*? And is not the ulterior limitation over to B. a *good remainder* to B. at common law?

What is the difference between a limitation over, after a *definite* or an *indefinite* failure of issue? What is the effect of the additional words—*dying without issue, living at his death*? Do not these last words *tie down* the limitation over to the death of a single life in being, at the death of the testator, viz: to the death of A. the first taker? If the added words—*living at A.'s death*—turn the *indefinite* to a *definite* failure of issue, at the end of a single life, is an *estate tail* at all created in B? If the limitation over to B., in the case last supposed, is *no estate tail*, can it be a good *remainder* after a previous *fee-simple* in A? Then since A. had *no fee-tail*, but a *fee-simple*, and the *remainder* over to B. is void, if limited by deed, is not the limitation given by *Will* to B. a good *executory devise*?

Under what circumstances, or what conditions, is an ultimate limitation, after a previous, limitation in *fee by Will*, good when thus created, though it is void if created *by deed*? Again, distinguish between a *remainder* and an *executory devise*, or a future use created under the Statutes of Uses?

What is the rule *against perpetuities*? Within what period is an *executory devise*, or future use, allowed to take effect and be valid under a *Will* or a limitation of uses, though the same limitation would be void if created or attempted to be created by deed, at common law? When was it first applied to *executory devises*, to restrain them within reasonable bounds?

What was the purport of the act of Virginia, of the 7th of October, 1776, abolishing *estates tail*, and enlarging every such estate into estate in *fee-simple absolute*? If after that act took effect, an estate was limited by *Will* to A. and his heirs, but if he died without issue, then to B. and his heirs, what estate did each of his devisees take? Did A. take, by virtue of the *Will*, an estate tail with a remainder over to B. on the failure of the issue of A? If so, what was the effect of the act of 1776 enlarging A.'s fee-tail into a fee-simple? Was B.'s remainder, created by the *Will*, annihilated by the law? Could B.'s remainder, limited after A.'s estate tail, survive the enlargement of A.'s estate into a fee-simple, by mere operation of the law? Could A.'s fee-simple and B.'s remainder, grafted upon A.'s original fee-tail, co-exist with it, after its enlargement into an absolute fee-simple? Or, were not both A.'s and B.'s original estates extinguished by the fiat of the law, A.'s fee-tail by merger into the fee-simple, and B.'s remainder, because there could be no *remainder* after the whole fee-simple was once vested in A?

Could B.'s remainder be good as an *executory devise*? Would it not thereby have offended against the law against perpetuities, in being limited to take effect after an indefinite failure of the issue of A? If, then, B.'s ulterior estate could not take effect either as a *remainder*, or as an *executory devise*, how could it take effect at all? See *Bells v. Gillespie*, 5 Rand. The act of 7th October, 1776, will be found in C. V., ch. 116, § 9. 2 Mat. Dig., 30, § 9.

What was the provision of the Virginia act of 1819, taking effect Jan. 1, 1820? It in substance provides that to the words—if the first taker die without issue, etc., the words—*living at his death, etc.*—shall be interpolated by statute. Is not this interpolated phrase, thus required to be read as part of the devise, equivalent to a declaration that the limitation over shall take effect after a *definite* and not an *indefinite* failure? If so read, is it not clear that the rule *against perpetuities* is not violated, and that the devise over after a preceding fee-simple is to take effect as an *executory devise*, limited after the death of a single devisee, living at the death of the testator? Is it not the case of one fee limited on a preceding fee, but the latter to take effect, if ever, within a life in being, and therefore a good *executory devise*?

(2.) Of estates of freehold, *not of inheritance.*

Of these, including all estates for life, by far the most important is **Dower!** To this estate I now limit myself, among these written questions.

Define the estate called Dower. If the husband is seized of an inheritance during the coverture and dies, leaving the wife, is she entitled to dower of all such lands of inheritance whereof he was seized at any time during the coverture? But suppose the estate of inheritance so limited to him and his heirs, is defeated by his death without issue living at his death, and in that event, it is limited over to other devisees, by the same will, through which the husband claims, is the limitation over to such other devisees a good *executory devise*? If it is such good executory devise to them, do they take, *subject to the dower of the widow, of the first devisee in fee, or relieved of it?*

This point is fully discussed in my Moot Court decision, in the case of *John Wilson's widow v. Robert Wilson's devisees*, of which you have a printed copy. I recommend a careful study of this important case by each one of the present class, both Juniors and Seniors. It decides every point embraced in the printed questions here submitted. I respectfully request that written answers be submitted by each member of the present class, both Juniors and Seniors.

In the case of *Phillip Rich v. James H. Campbell*, in the United States Circuit Court for the Southern District of Georgia, the Hon. JOSEPH P. BRADLEY, of the United States Supreme Court, presiding, we excerpt the following, and commend it to our readers. The opinion was delivered May 14, 1873:

If the public press and the leaders of public opinion would give to the courts and officers of the United States a due share of that credit for honesty of purpose, and fidelity to the laws, which is usually accorded to the judiciary and public functionaries of most free countries, there would be less disposition to criticise and carp at the administration of justice in those courts. It is a sad state of popular feeling and public morals, when nothing can be seen but corruption, and a desire to oppress on the part of those, against whom not the slightest evidence of such a disposition can be adduced, but whose whole desire appears to be, to administer the laws—it may be with firmness, but at the same time with mildness and impartiality. It is apt to give rise to a fear that it is not the functionary, but the government and laws themselves which are the real ground of offense. Every true patriot must desire and hope for a better state of things, in which mutual confidence may take the place of jealousies and suspicions, and in which every part of our broad and free Republic shall exhibit the old emulation for the national honor, and for the equal prosperity and advancement of every other part.

It is a well established rule that when a subscriber, especially to a periodical of this kind, fails to notify the publisher of his wish to discontinue his subscription, an implied assent or direction is thereby given for its continuation. And this is just. It is, moreover, recognized as just by the law. The expense and labor, if you will but consider, necessarily to be incurred, were the publisher required at the end of each term of subscription to notify the subscriber, and to request a renewal thereof, would be very great, and would probably in most instances, render an enterprise of this kind wholly impracticable. Whereas the subscriber, should he wish to discontinue, by postal card notification is put to but little labor and to an expense of only one cent. We wish to say a few plain words on this subject. We want our list of

subscribers increased, but not with the names of those who pay us only in unctious self-laudatory expressions of patronage. We do not stand in need of this. Kindly words of encouragement and praise are appreciated and valued. But we wish it understood, and distinctly, that we deem this publication a worthy one, and a full and fair equivalent for the price of subscription asked for it. We wish no one to subscribe to it who does not think this also; and if there are any such among our present subscribers, any who fancy they are conferring upon us a gracious favor, we would like to know that fact, and assure them of their mistake. We are compelled, however, until notified, to take for granted that those who fail to so notify us wish their subscription renewed, and accordingly the first number is sent them with bill for the year. What we have written has been provoked by the fact that some of our last year's subscribers, upon receiving bills for the present year, have answered us that they did not authorize a renewal of their subscription. And yet these gentlemen received both the first and second numbers of the present volume, paid postage as the law requires, for the entire year, on receipt of the first number, saw their names advertised in the Chart of the Southern Law Review Union, retained the copies sent them for months, and when returned, if at all, soiled, and consequently worthless to the publishers, and in the face of all this put in this disgraceful plea as an excuse to justify their refusal of payment. To whom we reply—if, upon the expiration of your subscription, you did not wish its renewal, you should have so informed us. Your failure to do so, was authorization to us to continue it. As lawyers, you should have known that this has been so held and declared repeatedly by courts of the highest authority, and strictly in consonance with natural reason and equity. As gentlemen, you ought to have known that good morals required it,—forbade, at least your receiving the numbers, using them until rendered worthless to the publishers if returned, and after you had enjoyed all the benefit you were capable of deriving therefrom.

We have received many letters from different portions of the Union, some from quite eminent jurists, testifying to the merit and worth of this Review. In many of the States it is already being quoted and referred to as a high authority. It is the only legal periodical published South, and we confidently assert second to none in the United States. One of its aims, surely a laudable one, and one which, if at all likely to succeed, should have at once rallied to it the united support of, at least, the Southern Bench and Bar, was, to represent and to aid in developing and maturing the highest legal culture of this section. If the lawyers of the South approve, and feel interested in the success of this attempt, assuredly it is but right that they should evidence it by kindly word and deed. We bespeak the assistance of our present subscribers in enabling us to increase our circulation to that extent that the future of the REVIEW, as at least one among, if not the first, legal periodicals in the United States, may be beyond peradventure assured. We promise them that everything in our power shall be done to make it merit their patronage, and reflect the highest type of legal knowledge and thought.

R. G. BARNWELL is no longer authorized to receive or receipt for subscriptions to this REVIEW, or to act in anywise as our agent for the same.

We are indebted to Hon. GEORGE C. GORHAM, Secretary of the Senate of the United States, for valuable recent opinions of the United States Supreme Court.

A Treatise on the Law of Personal Property. By JAMES SCHOULER. Boston: Little, Brown & Co. 1873.

We have received a copy of the above publication, but too late to include in our regular book notices. This work is certainly deserving of a place in every lawyer's library. It is the fullest and most satisfactory treatise on the law of "Personal Property" ever offered to the profession.

It covers the whole ground, excepting "Title to Personal Property." The large range of the learning on this latter topic, including gift and sale, made it impracticable to consider it without extending the present volume to unusual dimensions. The author hints at the possibility of a second volume, to be devoted exclusively to this topic.

We have read with great interest Chapter II, entitled "Money," wherein the author discusses the legal tender acts, the effect of contracts in Confederate notes, National Banks and their currency, and other live questions of a like nature. Chapter IX, entitled "Shares of Stock," defines the rights and liabilities of stockholders with a particularity not to be found, perhaps, in any other elementary work.

The chapters on Liens, Limited Partnerships, and Joint Stock Companies, are very able and satisfactory. We heartily recommend the book to all our readers.

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A L A B A M A.

COUNTY.	NAME.	POST OFFICE.
Autauga,	T. W. Sadler,	Prattville.
Baker,	G. W. Thaxton,	Clanton.
Barbour,	A. H. Cochran,	Eufaula.
"	A. H. Merrill,	"
"	Shorter & Brothers,	"
"	John Gill Pope,	"
"	Seals & Thomas,	Clayton.
Blount,	R. H. Wilson,	Blountsville.
Bullock,	J. W. L. Daniel,	Midway.
"	Neill McPherson,	Union Springs.
"	Norman & Wilson,	"
"	Wm. Ivey,	"
Butler,	Gamble & Powell,	Greenville.
"	Whitehead & Duke,	"
"	Herbert & Buell,	"
Calhoun,	M. J. Turnley & Son,	Jacksonville.
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Chambers,	James T. May,	Chambers C. H.
"	John A. Holmes,	Lafayette.
"	Wm. H. Denson,	Chambers.
Cherokee,	J. L. Cunningham,	Gadsden.
"	James H. Leath,	Centre.
"	McSpadden & Bradford,	"
Choctaw,	Glover & Coleman,	Butler.
"	J. J. Altman,	"
Clarke,	James J. Goode,	Coffeeville.
"	H. C. Grayson,	Grove Hill.
Clay,	A. S. Stockdale,	Ashland.
"	W. J. Pearce,	"
Cleburne,	George W. Perryman,	Edwardsville.
Coffee,	G. T. Yelverton,	Elba.
Colbert,	Jere. P. Rand,	Tuscumbia.
"	J. B. Moore,	"
Crenshaw,	Owens & Brother,	Rutledge.

ALABAMA—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Dale,	Benj. F. Cassady,	Ozark.
Dallas,	Pettus & Dawson,	Selma.
"	Morgan, Lapeley & Nelson,	"
"	Robt. H. Sterrett,	"
"	Fellows & Johns,	"
"	R. D. Berry,	"
"	Wm. M. Brooks,	"
"	Phillips & Mallory,	"
"	G. W. Gayle,	"
"	Sumpter Lea,	"
"	J. F. Conoly,	"
"	Byrd & Byrd,	"
"	J. C. Compton,	"
"	Alexander White,	"
De Kalb,	Nicholson & Collins,	Lebanon.
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Elmore,	O. Kyle,	Wetumpka.
Escambia,	James E. Green,	Pollard.
Fayette,	E. P. Jones,	Fayette C. H.
Franklin,	Wm. Cooper,	Tuscumbia.
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"	Isaac M. Downs,	Pleasant Site.
Greene,	Crawford & Mobley,	Eutaw.
Hale,	A. A. Coleman,	Greensboro.
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Henry,	Cowan & Oates,	Abbeville.
"	J. A. Corbitt,	"
Jackson,	Robinson & Parks,	Scottsboro.
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Jefferson,	Eugene McCaa,	Birmingham.
Lauderdale,	Wood, Kennedy & Wood,	Florence.
"	R. T. Simpson,	"
Lawrence,	Thomas M. Peters,	Moulton.
"	Ephraim H. Foster,	Courtland.
"	H. C. Speake,	Moulton.
Lee,	George & Geo. W. Hooper,	Opelika.
"	H. C. Lindsey,	"
Limestone,	Luke W. Pryor,	Athens.
"	John N. Malone,	"
"	Jones & Turrentine,	"
Lowndes,	Clements & Enochs,	Hayneville.
Macon,	W. C. McIver,	Tuskegee.
"	N. S. Graham,	"
"	Hugh M. King,	Society Hill.
Madison,	Isaiah Dill,	Huntsville.
"	David D. Shelby,	"
"	Robinson & Walker,	"
"	Beirne, Humes & Gordon,	"

ALABAMA—Continued.

COUNTY.	NAME.	POST OFFICE.
Madison,	John D. Weeden,	Huntsville.
"	Davis & Day,	"
"	Walker & Brickell,	"
"	John D. Brandon,	"
Marengo,	Geo. G. Lyon,	Demopolis.
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"	James T. Jones,	"
Marshall,	Wyeth & Boyd,	Guntersville.
Mobile,	J. P. Southworth,	Mobile.
"	Posey & Tompkins,	"
"	Nat. W. Trimble,	"
"	Mayer & Turner,	"
"	G. Y. Overall,	"
"	R. & O. J. Semmes,	"
"	J. T. Taylor,	"
"	L. Gibbons,	"
"	Geo. N. Stewart,	"
"	Alfred Goldthwaite,	"
"	J. Little Smith,	"
"	Wm. G. Jones,	"
"	C. F. Moulton,	"
"	R. H. & R. Inge Smith,	"
"	B. Labuzan,	"
"	E. H. Grandin,	"
"	Hamiltons,	"
Monroe,	James M. Davidson, Jr.,	Monroeville.
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"	F. C. Randolph,	"
"	G. H. Patrick,	"
"	Blakely & Ferguson,	"
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"	C. R. Hubbard,	"
"	Martin & Baldwin,	"
"	Virgil S. Murphey,	"
"	Benjamin Gardner,	"
"	John F. Bailey,	"
"	David Clopton,	"
"	W. R. C. Cocke,	"
"	Jno. G. Winter,	"
"	L. P. Shaver,	"
"	Watts & Troy,	"
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"	John A. Minnis.	"
Morgan,	C. C. Nesmith,	Somerville.
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"	C. C. Harris,	"
"	R. L. Elliott,	"

ALABAMA.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Perry,	John Walthall,	Marion.
"	W. B. Modawell,	"
Pickens,	M. L. Stansel,	Carrollton.
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"	H. S. Shelton,	"
"	Robert T. & Wm. T. Johnston,	"
Pike,	N. W. Griffin,	Troy.
"	Henry C. Wiley,	"
St. Clair,	John W. Inzer,	Ashville.
Shelby,	A. A. Sterrett,	Columbiana.
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Sumpter,	R. A. Meredith,	Gainesville.
"	Frank P. Snedecor,	"
Tallapoosa,	Oliver & Bulger,	Dadeville.
Talladega,	Bradford & Bradford,	Talladega.
"	J. T. Heflin,	"
"	Albert W. Plowman,	"
Tuscaloosa,	Hargrove & Fitts,	Tuscaloosa.
Walker,	Wm. B. Appling,	Jasper.
Wilcox,	Howard & Howard,	Camden.
"	S. J. Cummings,	"

ARKANSAS.

Arkansas,	Haliburton & Godden,	DeWitt.
"	James A. Gibson,	"
"	Abbott & Johnson,	"
"	Puyear & Freeman,	"
Ashley,	Van Gilder & McKelvy,	Hamburg.
"	Murphy & Wood,	"
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"	J. M. Doubleday,	"
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Carroll,	G. J. Crump,	Carrollton.
"	W. B. Dingle,	Berryville.
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"	D. H. Reynolds,	"
"	L. H. Springer,	"
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"	Stuart & McCabe,	"
Columbia,	B. F. Askew,	Magnolia.
"	John H. Garsett,	"
"	J. M. Kelso,	"
Conway,	Duncan & Woodard,	Springfield.
"	F. T. Rice,	Lewisburg.

ARKANSAS.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Conway,	B. C. Coblents,	Lewisburg.
Crawford,	Jesse Turner,	Van Buren.
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Craighead,	Mayfield Mooney,	Jonesboro.
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Desha,	B. F. Grace,	Napoleon.
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Drew,	W. F. Slemmons,	Monticello.
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"	Paul Graham,	Sub Rosa.
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Hempstead,	John R. Eakin,	Washington.
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Hot Springs,	George J. Summers,	Hot Springs.
"	Hugh McCallum,	Rockport.
Independence,	W. R. Miller,	Batesville.
Izard,	John C. Claiborne,	Pineville.
Jackson,	Lucien C. Gause,	Jacksonport.
"	W. A. Monroe,	"
"	Stedman R. Tilghman,	"
"	Joseph M. Bell,	"
"	A. W. Hurt,	"
Jefferson,	Bell & Carlton,	Pine Bluff.
"	T. F. Sorrells,	"
"	Read Fletcher,	"
"	R. D. McCracken,	"
"	Frank J. Wise,	"
Johnson,	Elisha Meers,	Clarksville.
"	Floyd & Cravens,	"
"	H. R. Withers,	"
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"	J. G. Johnson,	"
"	J. M. Montgomery,	"
"	Young & Cook,	"
Lawrence,	Geo. Thornburgh,	Smithville.
Lincoln,	D. H. Rousseau,	Star City.
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"	L. J. Joyner,	"
"	G. D. Britt,	Richmond.
Lonoke,	John C. England,	Lonoke.
Madison,	John S. Polk,	Huntsville.
"	Elias Harrell,	Drake's Creek.

ARKANSAS—Continued.

COUNTY.	NAME.	POST OFFICE.
Monroe,	Marston & Ewan,	Clarendon.
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"	Geo. W. Maberry,	Cotton Plant.
Montgomery,	George G. Latta,	Mt. Ida.
Perry,	B. S. Du Bose,	Perryville.
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Phillips,	Bruton & Davis,	Helena.
"	P. O. Thweat,	"
"	Palmer & Sanders,	"
"	Monroe Anderson,	"
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Pope,	Shapard & Bayliss,	Dover.
Pouissett,	Brown & Cobb,	Harrisburg.
Prairie,	Horace P. Vaughan,	Duvall's Bluff.
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"	J. S. Thomas,	"
Pulaski,	Clark & Williams,	Little Rock.
"	Fay Hempstead,	"
"	Wassell & Moore,	"
"	W. F. Grove,	"
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"	T. J. Ratcliffe,	"
Saline,	McKinley & Merritt,	Benton.
"	Sam. H. Whithorne,	"
Scott,	Bates & Latta,	Waldren.
"	E. T. Walker,	Black Jack.
Sebastian,	Ben. T. Du Val,	Fort Smith.
"	Horace L. Stiles,	"
"	John T. Hurley,	"
"	J. H. Sparks,	"
"	Rice & Rice,	Greenwood.
Sevier,	J. H. Lathrop,	Locksburg.
"	A. C. Steel,	"
Sharp,	Joseph L. Abernethy,	Evening Shade.
"	A. A. Clarke,	"
"	W. M. Davidson,	"
"	Sam. H. Davidson,	"
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Washita,	Leake & Salle,	Camden.
White,	B. D. Turner,	Searcy.
Yell,	Gibson & Toomer,	Dardenelle.

ARIZONA TERRITORY.

Prima,	J. E. McCaffry,	Tucson.
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CALIFORNIA.

COUNTY.	NAME.	POST OFFICE.
Fresno,	C. G. Sayle,	Millerton.
Lassen,	J. S. Chapman,	Susanville.
Mariposa,	J. B. Campbell,	Mariposa.
Napa,	J. E. Pond,	Napa City.
Sacramento,	Robert C. Clark,	Sacramento.
San Francisco,	Campbell, Fox & Campbell,	San Francisco.
"	Provine & Johnson,	"
San Joaquin,	Joseph M. Cavis,	Stockton.
Santa Clara,	E. A. Clark,	San Jose.
Stanislaus,	T. A. Caldwell,	Knight's Ferry.
Tulare,	S. C. Brown,	Visalia.

COLORADO.

Boulder,	G. Berkley,	Boulder.
Gilpin,	Lewis C. Rockwell,	Central City.

CONNECTICUT.

Fairfield,	Treat & Bullock,	Bridgeport.
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New London,	Wait & Swan,	Norwich.

DELAWARE.

Kent,	Elias S. Reed,	Dover.
New Castle,	Edward Bradford, Jr.,	Wilmington.

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F. P. B. Sands,	Washington.
James H. Embry,	"

FLORIDA.

Alachua,	Finley & Finley,	Gainesville.
Bradford,	Wm. W. Wills,	Lake Butler.
Calhoun,	Oliver P. Fannin,	Abe Spring.
Columbia,	R. W. Broome,	Lake City.
Duval,	F. I. Wheaton,	Jacksonville.
"	James Bell,	"
"	W. R. Anno,	"
"	H. A. Pattison,	"
Escambia,	E. A. Perry,	Pensacola.
"	J. Dennis Wolfe,	"
"	R. L. Campbell,	"
"	A. E. Maxwell,	"
Franklin,	H. G. Townsend,	Apalachicola.
"	M. C. Pickett,	"
Gadsden,	Davidson & Love,	Quincy.
"	John W. Malone,	"
"	Stephens & Love,	"
"	Edward Owens,	"
"	A. K. Allison,	"

FLORIDA—Continued.

COUNTY	NAME.	POST OFFICE.
Hamilton,	Henry J. Stewart,	Jasper.
Hillsboro,	Henderson & Henderson,	Tampa.
"	J. B. Wall,	"
"	H. S. Mitchell,	"
Jackson,	George S. Hawkins,	Marianna.
"	Wm. H. Milton,	"
"	Frank Baltzell,	"
Jefferson,	Scott & Clarke,	Monticello.
Leon,	Walker & Baker,	Tallahassee.
"	R. B. Hilton,	"
Madison,	Hunter Pope,	Madison.
Marion,	Hugh E. Miller,	Ocala.
Monroe,	Witer Bethel,	Key West.
"	G. Bonne Patterson,	"
Nassau,	Felix Livingston,	Fernandina.
"	Robert M. Smith,	"
"	John Friend,	"
Orange,	James J. Davis,	Orlando.
St. Johns,	W. Howell Robinson,	St. Augustine.
Santa Rosa,	John Chain,	Milton.
Sumpter,	A. C. Clark,	Sumpterville.
Suwanee,	Wm. Bryson,	Live Oak.
"	J. F. White,	"
Walton,	D. G. McLeod,	Knox Hill.
"	Daniel Campbell,	Euchee Anno.

GEORGIA.

Appling,	John F. DeLacey,	Graham.
Baldwin,	W. G. McAdoo,	Milledgeville.
"	Sanford & Furman,	"
"	Wm. McKinley,	"
Bartow,	Robert W. Murphey,	Cartersville.
"	John Cox,	"
"	Abda Johnson,	"
"	Wofford & Milner,	"
"	Warren Akin,	"
Bibb,	Nisbets & Jackson,	Macon.
"	R. W. Jemison,	"
"	W. A. Lofton,	"
"	C. B. Wooten,	"
"	Lanier & Anderson,	"
"	John Rutherford,	"
"	T. J. Simmons,	"
"	B. & W. B. Hill,	"
"	Thomas B. Cox,	"
Brooks,	John G. McCall,	Quitman.
"	S. T. Kingsbery,	"
"	Edward R. Harden,	"
Bullock,	E. C. Moseley,	Statesboro.

GEORGIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Burke,	John D. Ashton,	Waynesboro.
"	Wm. Warnock,	Lester's District.
Calhoun,	J. J. Beck,	Morgan.
Camden,	J. M. Arnow,	St. Mary's.
Campbell,	Tidwell & Roan,	Fairburn.
Carroll,	George W. Austin,	Carrollton.
"	Oscar Reese,	"
"	George W. Harper,	"
"	R. L. Richards,	Bowenville.
Chatham,	Harden & Levy,	Savannah.
"	John H. Thomas,	"
"	Wm. N. Heyward,	"
"	Charles N. West,	"
"	T. R. Mills, Jr.,	"
"	A. P. Adams,	"
"	W. D. Harden,	"
"	Wylly & Phillips,	"
"	R. E. Lester,	"
"	J. V. Ryals,	"
"	Smith & Beeks,	"
"	P. W. Meldrim,	"
"	J. J. Abrams,	"
"	Wm. U. Garrard,	"
"	Henry B. Tompkins,	"
"	Howell & Denmark,	"
Chattahoochee,	H. Bussey,	Cusseta.
"	W. A. Farley,	"
Cherokee,	James O'Dowda,	Canton.
Clay,	John C. Wells,	Fort Gaines.
"	S. A. McLendon,	"
Clinch,	J. L. Sweat,	Homersville.
"	H. D. & David O'Quin,	Lawton.
Cobb,	W. T. Winn,	Marietta.
Columbia,	Charles H. Shockley,	Appling.
Coweta,	Lucius H. Featherston,	Newnan.
Crawford,	Thomas F. Green, Jr.,	Knoxville.
Dade,	Robert H. Tatum,	Rising Fawn.
Decatur,	George W. Hines,	Bainbridge.
"	Gurley & Russell,	"
"	Fleming & Rutherford,	"
Dougherty,	Smith & Jones,	Albany.
Early,	R. H. Powell,	Blakely.
Elbert,	H. A. Roebuck,	Elberton.
Emanuel,	M. B. Ward,	Swainsboro.
"	Josephus Camp,	"
Floyd,	Wright & Featherston,	Rome.
"	Wm. D. Elam,	"
"	Forsyth & Reece,	"
"	Hamilton Yancey,	"

GEORGIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Floyd,	Underwood & Rowell,	Rome.
Forsyth,	H. L. Patterson,	Cumming.
Fulton,	Newman & Harrison,	Atlanta.
"	W. Izard Heyward,	"
"	A. O. Lochrane	"
"	B. H. Hill & Sons,	"
"	L. E. Blackley,	"
"	Samuel Weil,	"
"	Robert Baugh,	"
"	M. A. Bell,	"
"	J. T. McCormick,	"
"	Henry P. Farrow,	"
"	George S. Thomas,	"
"	Lucius J. Gartrell,	"
"	A. B. Culberson,	"
Gilmer,	H. R. Foote,	Ellejay.
Glynn,	William Williams,	Brunswick.
"	T. E. Davenport,	"
Gordon,	W. S. Johnson,	Calhoun.
"	W. J. Cantrell,	"
"	J. C. Pain,	"
Greene,	Miles W. Lewis,	Greensborough.
"	James L. Brown,	"
Gwinnett,	N. L. Hutchins,	Lawrenceville.
Hall,	Phil. R. Simmons,	Gainsville.
"	M. Van Estes,	"
Hancock,	J. T. Jordan,	Sparta.
"	James A. Harley,	"
Harris,	Henry C. Cameron,	Hamilton.
Hart,	C. W. Seidel,	Hartwell.
Houston,	E. W. Crocker,	Fort Valley.
Jasper,	Bolling Whitfield,	Monticello.
Jefferson,	Carswell & Denny,	Louisville.
Laurens,	Rollin A. Stanley,	Dublin.
"	Rivers & Conner,	"
"	James A. Thomas, Jr.,	"
Lee,	James Dodson,	Smithville.
Liberty,	J. W. Farmer,	Hinesville.
"	Walter A. Way,	Walthourville.
Lowndes,	Whittle & Morgan,	Valdosta.
"	G. T. Hammond,	"
"	A. H. Smith,	"
Lumpkin,	Weir Boyd,	Dahlonega.
Macon,	R. G. Ozier,	Montezuma.
"	W. H. Reese,	Marshallville.
"	Thos. P. Lloyd,	Ogletherpe.
McDuffie,	Paul C. Hudson,	Thomson.
"	H. C. Roney,	"
"	W. T. O'Neal,	"

G E O R G I A.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
McIntosh,	D. A. McIntosh,	Darien.
Merriweather,	John W. Park,	Greenville.
Milton,	Thomas L. Lewis,	Alpharetta.
Mitchell,	W. C. McCall,	Camilla.
"	James H. Spence,	"
Monroe,	T. B. Cabaniss,	Forsyth.
Muscogee,	Ingram & Crawford,	Columbus.
"	Raphael J. Moses,	"
"	Louis F. Garrard,	"
"	D. H. Burts,	"
"	Alonzo A. Dozier,	"
"	W. A. Little,	"
Newton,	L. B. Anderson,	Covington.
"	Clark & Pace,	"
Oglethorpe,	E. C. Shackelford,	Lexington.
Paulding,	S. L. Strickland & N. N. Beall,	Dallas.
Pierce,	John C. Nicholls,	Blackshear.
Pike,	H. Green,	Zebulon.
"	J. A. Hunt,	Barnesville.
Polk,	Thos. W. Dodd,	Rock Mart.
"	A. T. Williamson,	"
Pulaski,	Charles C. Kibbee,	Hawkinsville.
"	L. C. Ryan,	"
"	O. C. Horne,	"
"	A. C. Pate,	"
"	John H. Martin,	"
Putnam,	Wm. A. Reid,	Eatonton.
Richmond,	A. R. & H. G. Wright,	Augusta.
"	Frank H. Miller,	"
"	Jos. P. Carr,	"
"	W. F. Eve,	"
"	John S. Davidson,	"
"	W. A. Walton,	"
"	Marcellus P. Foster,	"
"	A. C. Holt,	"
"	James S. Hook,	"
Rockdale,	J. W. Early,	Conyers.
"	W. D. Atkinson, Jr.,	"
Schley,	Hudson & Wall,	Ellaville.
Scriven,	Geo. R. Black,	Sylvania.
"	W. L. Mathews, Jr.,	Ogeechee.
"	Henry C. Kittles,	Sylvania.
Spaulding,	D. N. Martin,	Griffin.
"	J. M. Campbell,	"
Sumpter,	Hawkins & Guerry,	Americus.
"	John R. Worrill,	"
Talbot,	W. A. Little,	Talbotton.
Taylor,	O. M. Colbert,	Butler.
Terrell,	R. F. Simmons,	Dawson.

GEORGIA—Continued.

COUNTY.	NAME.	Post Office.
Telfair,	John McDermid,	McRea.
Thomas,	Hopkins & Hopkins,	Thomasville.
"	K. T. MacLean,	"
Troup,	Speer & Speer,	LaGrange.
"	W. W. Turner,	"
"	Thos. A. Whitaker,	"
Upson,	John I. Hall,	Thomaston.
"	Thomas Beall,	"
Walker,	J. C. Clements,	Lafayette.
Walton,	John W. Arnold,	Monroe.
Washington,	S. G. Jordan,	Sandersville.
Wayne,	W. C. Remshart,	Jesup.
Whitfield,	T. R. Jones,	Dalton.
Wilkes,	W. M. Reese,	Washington.
"	Robert Toombs,	"
Wilkinson,	F. Chambers,	Irvinton.

IDAHO.

Nez Perce,	Jasper Rand,	Lewiston.
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ILLINOIS.

Adams,	G. W. Fogg,	Quincy.
Alexander,	Allen, Mulkey & Wheeler,	Cairo.
Cass,	J. Henry Shaw,	Beardstown.
Champaign,	Sweet & Lothrop,	Champaign.
Clark,	Whitehead & Hare,	Marshall.
Cook,	E. A. Otis,	Chicago.
DeWitt,	Palmer & Ferguson,	Clinton.
Douglass,	R. B. Macpherson,	Tuscola.
DuPage,	W. G. Smith,	Wheaton.
Effingham,	S. F. Gilmore,	Effingham.
Ford,	A. M. McElroy,	Paxton.
Franklin,	Alfred C. Duff,	Benton.
Greene,	Burr & Wilkinson,	Carrollton.
Hamilton,	R. S. Anderson,	McLeansboro.
Hancock,	David Mack,	Carthage.
Iroquois,	Blades & Kay,	Watseka.
Jefferson,	C. H. Patton,	Mt. Vernon.
Kane,	Wheaton, Smith & McDole,	Aurora.
Kankalee,	C. A. Lake,	Kankalee City.
Knox,	J. B. Boggs,	Galesburg.
"	G. C. Lanphere,	"
Lawrence,	T. P. Lowry,	Lawrenceville.
Lee,	A. K. Trusdell,	Dixon.
Livingston,	Pillsbury & Lawrence,	Pontiac.
McLean,	Stevenson & Ewing,	Bloomington.
Macon,	I. A. Buckingham,	Decatur.
Marshall,	A. J. Bell,	Lacon.
Mason,	Wright & Cochran,	Havana.

ILLINOIS—Continued.

COUNTY.	NAME.	POST OFFICE.
Massac,	Edward McMahon,	Metropolis.
Mercer,	McCoy & Clokey,	Aledo.
Montgomery,	W T. Coale,	Hillsboro.
Morgan,	Wm. Brown,	Jacksonville.
Moultrie,	W. G. Patterson,	Sullivan.
Peoria,	Thomas Cratty,	Peoria.
Piatt,	S. R. Reed,	Monticello.
Pope,	Thomas H. Clark,	Golconda.
Putnam,	Frank Whiting,	Granville.
Richland,	F. D. Preston,	Olney.
Rock Island,	W. H. Gest,	Rock Island.
St. Clair,	Kase & Wilderman,	Belleville.
Sangamon,	N. M. Broadwell,	Springfield.
"	C. M. Morrison,	"
Shelby,	Hess & Stephenson,	Shelbyville.
Tazewell,	John B. Cohrs,	Pekin.
Union,	Hugh Andrews,	Jonesboro.
Vermillion,	Wm. A. Young,	Danville.
Warren,	William Marshall,	Monmouth.
Wayne,	James A. Creighton,	Fairfield.
Woodford,	George H. Kettele,	Metamora.

INDIANA.

Allen,	Combs, Miller & Bell,	Fort Wayne.
Boone,	Ralph B. Simpson,	Lebanon.
Cass,	Frank Swigot,	Logansport.
Clarke,	S. L. Robison,	Charlestown.
Clay,	Rose & Stephenson,	Bowling Green.
Crawford,	N. R. Peckinpough,	Leavenworth.
Daviess,	W. J. Mason,	Washington.
Dearborn,	Adkinson & Roberts,	Lawrenceburg.
Decatur,	Gavin & Miller,	Greensburg.
DeKalb,	James E. Rose,	Auburn.
Elkhart,	R. M. Johnson,	Goshen.
Floyd,	Huckeby & Huceby,	New Albany.
Franklin,	Chas. Moorman,	Brookville.
Gibson,	Wm. M. Land,	Princeton.
Grant,	G. T. B. Carr,	Marion.
Hamilton,	Evans & Stephenson,	Noblesville.
Hancock,	James L. Mason,	Greenfield.
Henry,	Wm. Grose,	New Castle.
Howard,	J. H. Kroh,	Kokomo.
Huntington,	Ulysses D. Cole,	Huntington.
Jackson,	Long & Long,	Brownstown.
Jasper,	Thomas J. Spittler,	Rensselaer.
Jay,	James W. Templer,	Portland.
Jefferson,	Wilson & Wilson,	Madison.
Knox,	J. S. Pritchett,	Vincennes.
LaGrange,	C. U. Wade,	LaGrange.

INDIANA—Continued.

COUNTY.	NAME.	POST OFFICE.
Lake,	T. S. Fancher,	Crown Point.
LaPorte,	E. G. McCollum,	LaPorte.
Madison,	James H. McConnel,	Anderson.
Marion,	Robert N. Lamb.	Indianapolis.
Monroe,	James B. Mulky,	Bloomington.
Morgan,	J. V. Mitchell,	Martinsville.
Ohio,	S. R. & D. T. Downey,	Rising Sun.
Perry,	Charles H. Mason,	Cannelton.
Pike,	Charles H. McCarty,	Petersburg.
Porter,	Thomas J. Merrifield,	Valparaiso.
Poesy,	Spencer & Loudon,	Mt. Vernon.
Randolph,	Browne & Thompson,	Winchester.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Sullivan,	John T. Gunn,	Sullivan.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith.	Bluffton.

IOWA.

Benton,	John Shane,	Vinton.
Boone,	C. W. Williams,	Boonesboro.
Cass,	J. T. Hanna,	Atlantic.
Cerre Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clark,	John Chaney,	Oceola.
Clinton,	Albert L. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Duzee & Henderson,	Dubuque.
Fayette,	Ainsworth & Millar,	West Union.
Hancock,	James Crow,	Ellington.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	Woolson & Babb,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	George D. Woodin,	Sigourney.
Lee,	Frank Allyn,	Keokuk.
Lucas,	E. B. Woodward,	Chariton.
Madison,	Leonard, Mott & Leonard,	Winterset.
Marion,	Anderson & Collins,	Knoxville.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Phillips & Phillips,	Des Moines.
Pottawatomie,	Baldwin, Wright & Rising,	Council Bluff.
Poweshiek,	L. C. Blanchard,	Montezuma.
Scott,	J. W. Stewart,	Davenport.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Milligan,	Afton.

I O W A—Continued.

COUNTY.	NAME.	POST OFFICE.
Wapello,	E. L. Burton,	Ottumwa.
"	Edward H. Stiles,	"
Warren,	Bryan & Seever,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Coryden.
Webster,	J. F. Duncombe,	Fort Dodge.
Woodbury,	Isaac Pendleton,	Sioux City.

KANSAS.

Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Atchison,	Horton & Waggener,	Atchison.
Barton,	John Foster,	Great Bend.
Bourbon,	W. J. Bawden,	Fort Scott.
"	E. F. Ware,	"
"	A. A. Harris,	"
Butler,	W. T. Galliher,	Eldorado.
Chase,	S. N. Wood,	Cottonwood Falls.
Coffey,	Fearle & Stratton,	Burlington.
"	J. Cox,	"
Doniphan,	Sidney Tennent,	Troy.
Douglas,	A. J. Reid,	Lawrence.
Franklin,	A. Franklin,	Ottawa.
Jackson,	Wm. Henry Dodge,	Holton.
"	A. M. Crockett,	Netawaka.
Jefferson,	W. E. Stanley,	Oskaloosa.
Leavenworth,	Clough & Wheat,	Leavenworth City
Lyon,	W. T. McCarty,	Emporia.
Miami,	James Kingsley,	Paola.
Morris,	A. J. Hughes,	Council Grove.
Shawnee,	James M. Spencer,	Topeka.

KENTUCKY.

Ballard,	F. M. Jenkins,	Blandville.
"	Thos. P. Hays,	Milburn.
Barren,	Smith & Son,	Glasgow.
Bath,	Nesbitt & Gudgell,	Owingsville.
"	D. S. Trumbo,	Bethel.
Boone,	Jas. B. Finnell,	Verona.
Boyd,	Ireland & Hampton,	Ashland.
Butler,	B. L. D. Guffy,	Morgantown.
Caldwell,	F. W. Darby,	Princeton.
"	C. T. Allen,	"
Callaway,	R. D. Brown,	Murray.
Carter,	J. R. Botts,	Grayson.
"	Wm. Bowling,	"
"	E. B. Wilhoit,	"
Christian,	Ritter & Sybert,	Hopkinsville.

KENTUCKY—Continued.

COUNTY.	NAME.	POST OFFICE.
Christian,	Wood & Gaines,	Hopkinsville.
Clarke,	W. M. Beckner,	Winchester.
Crittenden,	J. W. Blue,	Marion.
Daviess,	G. W. Ray,	Owensboro.
"	I. P. Washburn,	"
Fayette,	Wm. C. P. Breckenridge,	Lexington.
"	Evan P. Graves,	"
"	George E. Billingsley,	"
"	Charles R. Williams,	"
Fleming,	A. E. Cole,	Flemingsburg.
Floyd,	E. G. H. Harris,	Prestonsburg.
"	Millin H. May,	"
"	Robert S. Friend,	"
Franklin,	T. N. & D. W. Lindsey,	Frankfort.
"	Drane & Chinn,	"
Fulton,	T. O. Goadler,	Hickman.
Garrard,	Jas. A. Anderson,	Lancaster.
"	Geo. Denny, Jr.,	"
Grant,	W. T. Simmonds,	Williamstown.
"	O. D. McManama,	"
"	W. N. Hogan,	"
Grayson,	Thomas E. Ward,	Litchfield.
Green,	Wm. B. Allen,	Greensburg.
Greenup,	B. F. Bennet,	Greenup.
"	George T. Halbert,	"
"	George E. Roe,	"
Hancock,	Eldred E. Pate,	Hawesville.
Hart,	George T. Reed,	Munfordsville.
Henderson,	Charles Eaves,	Henderson.
"	A. J. Anderson,	"
Henry,	Buckley & Buckley,	New Castle.
Hickman,	F. M. Ray,	Clinton.
"	Silvertooth & Son,	"
"	N. P. Moss,	"
"	John M. Brummal,	Columbus.
"	Geo. W. Griffey,	Moscow.
Jefferson,	W. O. Watts,	Louisville.
"	L. H. Noble,	"
"	Gasley, Yeaman & Reinecke,	"
"	R. & L. Buchanan,	"
"	Easton & Callaway,	"
"	St. John Boyle,	"
"	E. W. C. Humphries,	"
"	D. W. Armstrong,	"
"	G. P. Arbegust,	"
"	Lee & Rodman,	"
"	Alex. Willey,	"
"	D. W. Sanders,	"
"	Andrew Barnett,	"

KENTUCKY—Continued.

COUNTY.	NAME	POST OFFICE.
Jefferson,	Robert W. Hays,	Louisville.
"	B. H. Young,	"
"	Boone & Boone	"
"	Ward & Ward,	"
"	W. W. Bradley,	"
"	Duke & Richards,	"
"	B. H. Allen,	"
"	James A. Beattie,	"
"	T. & J. Caldwell,	"
"	Buford Twyman,	"
"	A. Winston,	"
"	Russell & Helms,	"
Johnson,	J. Frew Stewart,	Paintsville.
"	Greenville Lagrave,	"
Kenton,	Milton L. Roberts,	Covington.
"	L. E. Baker,	"
"	J. E. Hamilton,	"
"	John P. Harrison,	"
"	S. A. Hagerty,	"
Knox,	F. P. Stickley,	Barboursville.
"	W. Herndon,	"
Larue,	John W. Gore,	Hodgenville.
Livingston,	Bush & Bush,	Smithland.
"	John L. Murray,	"
Logan,	A. G. Rhea,	Russellville.
Lyon,	Dan. B. Cassidy,	Eddyville.
Magoffin,	D. D. Sublett,	Salersville.
McCracken,	Houston & Houston,	Paducah.
"	Edward T. Bullock,	"
"	J. B. Husbands,	"
McLean,	S. J. Boyd,	Calhoun.
Meade,	Kincheloe & Lewis,	Brandenburg.
"	Wm. Alexander,	"
Menifee,	W. S. Pierce,	Frenchburg.
Metcalfe,	John W. Compton,	Edmonton.
Montgomery,	John Jay Cornelison,	Mount Sterling.
Morgan,	John T. Hazelrigg,	West Liberty.
Ohio,	E. Dudley Walker,	Hartford.
"	McHenry & Hill,	"
"	Harrison D. Taylor,	"
Oldham,	J. W. Clayton,	Lagrange.
Owen,	Perry & Strother,	Owentown.
Pendleton,	Perry F. Bonar,	Falmouth.
Powell,	A. C. Daniel,	Stanton.
Pulaski,	W. H. Pettus,	Somerseset.
Russell,	J. A. Williams,	Jamestown.
Shelby,	Erasmus Frazier,	Shelbyville.
Taylor,	D. G. Mitchell,	Campbellsville.

KENTUCKY—Continued.

COUNTY.	NAME.	POST OFFICE.
Todd,	J. H. Lowry,	Elkton.
Trigg,	Jno. S. Spiceland,	Cadiz.
"	W. L. Fuqua,	Canton.
Trimble,	Jacob Yeager,	Bedford.
Union,	John S. Geiger,	Morganfield.
Warren,	Bates & Wright,	Bowling Green.
"	Hines & Porter,	"
"	James H. Rose & T. W. Campbell,	"
Washington,	Richard J. Browne,	Springfield.
Webster,	A. Edwards,	Dixon.
"	M. C. Givens,	"
"	F. M. Hutcheson,	"
Wolfe,	A. H. Quillin,	Campton.
Woodford,	Blackburn & Twyman,	Versailles.

LOUISIANA.

Ascension,	R. N. Sims,	Donaldsonville.
Assumption,	Hiram H. Carver,	Napoleonville.
Baton Rouge,	George W. Buckner,	Baton Rouge.
"	Henry Avery,	"
Caddo,	J. L. & H. H. Hargrove,	Shreveport.
"	Levisse, Ashton & Blanchard,	"
"	T. F. Bell,	"
"	Duncan & Moncure,	"
"	J. H. Kilpatrick,	"
Caldwell,	Thos. E. Meredith,	Columbia.
"	Arthur H. Harris,	"
Carroll,	Daniel B. Gorham,	Lake Providence.
Catahoula,	Smith & Boatner,	Harrisonburg.
Claibourne,	Robt. T. Vaughn,	Homer.
"	J. S. Young,	"
"	Drayton B. Hayes,	"
"	James W. Wilson,	"
East Feliciana,	Thos. A. Moore,	Clinton.
"	Frank Hardesty,	"
"	D. J. Wedge,	"
Franklin,	W. W. Campbell,	Winnsboro.
"	Wells & Corkern,	"
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine.
Iberia,	Robert S. Perry,	New Iberia.
"	L. H. Montanye,	"
"	U. S. Haase,	"
"	Wm. F. Schwing,	"
"	Jos. A. Breaux,	"
Jackson,	Graham & Smith,	Vernon.
"	Hamlett & Kidd,	"
Jefferson,	Wm. Mithoff, Jr.,	Carrollton.

LOUISIANA—Continued.

PARISH.	NAME.	POST OFFICE.
Lafayette,	Conrad Debaillon,	Vermillionville.
Lafourche,	Thomas L. Winder,	Thibodeaux.
"	J. S. Goode,	"
Madison,	J. Tyson Lane,	Tallulah.
Morehouse,	Newton & Hall,	Bastrop.
"	Morgan & Newton,	"
"	Sylvester G. Parsons,	"
Nachitoches,	Jack & Pierson,	Nachitoches.
"	Morse & Dranguet,	"
Orleans,	Sam. C. Reid,	New Orleans,
"	Canonge & Cazabat,	46 Carondelet Street.
"	R. G. Harris,	New Orleans,
"	Richard DeGray,	84 Exchange Place.
"	A. A. Atocha,	New Orleans,
"	A. B. Cunningham,	28 Commercial Place.
"	Race, Foster & E. T. Merrick,	New Orleans,
"	James Langan,	P. O. Box 1172.
"	J. W. Kerr,	New Orleans.
"	Peter J. Kramer,	"
"	Sam'l R. & C. L. Walker,	"
"	G. H. Braughn,	New Orleans,
"	Henry C. Dibble,	81 Commercial Place.
"	John M. Bonner,	New Orleans,
"	Robert L. Preston,	84 Exchange Alley.
Plaquemine,	Armand Lartigue,	New Orleans,
Red River,	T. E. Paxton,	61 Camp Street.
"	Luke W. Conerly,	New Orleans,
Richland,	Wells & Williams,	Look Box 974.
"	H. P. Wells,	New Orleans.
St. Helena,	James H. Muse,	New Orleans,
St. Landry,	Joseph M. M. Moore,	125 Gravier Street.
"	J. F. Knox,	New Orleans,
St. Martin's,	Felix Voorhies,	43 Carondelet Street.
"	DeBlanc & Tournet,	Point a la Hache.
Tensas,	Reeve Lewis,	Coushatta.
Terrebonne,	John B. Winder,	"
"	J. L. Belden,	Rayville.
Union,	Barrett & Trimble,	Delhi.
Washita,	J. & S. D. McEnery,	Greensbury.
"	Richardsons & McEnery,	Opelousas.
"	R. G. Cobb,	"
West Feliciana,	Samuel J. Powell,	St. Martinsville.
Webster,	A. B. George,	"
Winn,	W. R. Roberts,	St. Joseph.
		Houma.
		"
		Farmerville.
		Monroe.
		"
		"
		St. Francisville.
		Minden.
		Winnfield.

MAINE.

COUNTY.	NAME.	Post Office.
Kennebec,	Joseph Baker,	Augusta.
Knox,	Geo. H. M. Barrett,	Rockport.
Oxford,	H. Upton,	Norway.

MARYLAND.

Anne Arundel,	Randal & Hagner,	Annapolia.
Baltimore,	John Thompson Mason,	Baltimore.
"	Daniel Clarke,	"
Cecil,	John E. Wilson,	Elkton.
Frederick,	Wm. P. Maulsby, Jr.,	Frederick.
Queen Anne's,	John B. Brown,	Centreville.
St. Mary's,	Combs & Downs,	Leonardtown.
Talbot,	C. H. Gibson,	Easton.

MICHIGAN.

Allegan,	Arnold & Stone,	Allegan.
Barry,	Wm. H. Hayford,	Hastings.
Bay,	C. H. Denison,	Bay City.
Calhoun,	Alvan Peck,	Albion.
Houghton,	Ball & Chandler,	Houghton.
Huron,	Richard Winsor,	Port Austin.
Ingham,	Wm. H. Pinckney,	Lansing.
Isabella,	Fancher & Hopkins,	Mount Pleasant.
Macomb,	Edgar Weeks,	Mt. Clemens.
Marquette,	D. H. Ball,	Marquette.
Oakland,	O. F. Wisner,	Pontiac.
Saginaw,	Gaylord & Hanchett,	Saginaw.
St. Clair,	Atkinson Brothers,	Port Huron.
St. Joseph,	R. W. Melendy,	Centreville.
Shiawassee,	E. Gould,	Owasee.
Tuscola,	J. P. Hoyt,	Caro.
Wayne,	Meddaugh & Driggs,	Detroit.

MINNESOTA.

Dodge,	G. B. Cooley,	Mantorville.
Martin,	M. E. L. Shanks,	Fairmont.
Mower,	G. W. Cameron,	Austin.
Ramsey,	S. M. Flint,	St. Paul.
Stearns,	L. A. Evans,	St. Cloud.
Steele,	A. C. Hickman,	Owatonna.
Winona,	Simpson & Wilson,	Winona.

MISSISSIPPI.

Adams,	Ralph North,	Natchez.
Amite,	George F. Webb,	Liberty.
Attala,	Campbell & Anderson,	Kosciusko.
"	D. C. Wasson,	"
"	Butt & Scarborough,	"

MISSISSIPPI—Continued.

COUNTY.	NAME.	POST OFFICE.
Bolivar,	George T. Lightfoot,	Neblett's Landing.
Benton,	Kimbrough & Abernathy,	Ashland.
Calhoun,	Roane & Roane,	Pittsboro'.
Carroll,	James Somerville,	Carrolton.
"	Keyes, Nelson & Bean,	"
"	W. B. Helm,	"
Chickasaw,	Lacy & Thornton,	Okalona.
Chocktaw,	D. B. Archer,	La Grange.
"	Brantley, Dunn & Holloway,	"
Claiborne,	J. H. & J. F. Maury,	Port Gibson.
"	Wm. Sillers,	"
"	E. H. Stiles,	"
Clarke,	S. Evans,	Enterprise.
"	S. H. Terrall,	Quitman,
Coahoma,	James T. Rucks,	Friars' Point.
Colfax,	Wm. H. Hill,	Palo Alto.
Copiah,	Stone & Haley,	Hazelhurst.
"	Tim. E. Cooper,	"
"	L. O. Bridewell,	Beauregard.
De Soto,	Thos. H. Johnston,	Hernando.
Franklin,	J. F. Sessions,	Meadville.
Grenada,	A. S. Pass,	Grenada.
Greene,	Jno. McInnis,	Vernal.
Harrison,	T. J. Humphries,	Handsboro.
Hinds,	Chas. F. Clint,	Jackson.
"	Sam'l M. Shelton,	Raymond.
"	George A. Smythe,	Jackson.
"	J. Z. George,	"
"	A. H. Handy,	"
Holmes,	H. S. Hooker,	Lexington.
"	Allen & Dyson,	"
Issaquena,	W. S. Fariah,	Mayersville.
Jasper,	Street & Chapman,	Paulding.
"	Walter Acker,	"
Jefferson,	J. J. Whitney,	Fayette.
"	Thomas Reed,	"
Kemper,	Ellis & Brame,	De Kalb.
Lauderdale,	Steel & Watts,	Meridian.
"	Thomas H. Woods,	"
Lawrence,	K. R. Webb,	Brookhaven.
Lee,	J. D. Williams,	Tupelo.
"	Clayton & Clayton,	"
"	J. D. Barton,	"
"	J. L. Finley,	Guntown.
Leflore,	Somerville & Yarger,	Greenwood.
Lincoln,	Chrisman & Thompson,	Brookhaven.
"	Cassedy & McNair,	"
Lowndes,	Leigh & Evans,	Columbus.
"	Geo. A. Ramsey,	

MISSISSIPPI.—*Continued.*

COUNTY.	NAME.	Post Office.
Madison,	John Handy,	Canton.
"	S. M. Wook,	"
"	George Harvey,	"
Marshall,	Wm. M. Strickland	Holly Springs.
"	Featherston, Harris & Watson,	"
Monroe,	John B. Walton,	Aberdeen.
"	Davis & McFarland,	"
"	Mason M. Cummings,	"
Oktibbeha,	Sullivan & Turner,	Starkville.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Rankin,	W. B. Shelby,	Brandon.
"	J. M. Jayne, Jr.,	"
"	Mayers & Lowry,	"
Simpson,	M. A. Banks,	Westville.
Tallahatchee,	Bailey & Boothe,	Charleston.
Tippah,	Thompson & Falkner,	Ripley.
Tishomingo,	L. P. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
"	James T. Coleman,	"
"	T. A. & M. Marshall,	"
"	Brien & Spears,	"
"	Catchings & Ingersoll,	"
"	John D. Gilland,	"
Washington,	Trigg & Buckner,	Greenville.
"	S. W. Ferguson,	"
"	Jno. F. Harris,	"
Wayne,	J. W. Boykin,	Winchester.
Wilkinson,	L. K. Barber,	Woodville.
"	T. V. Noland,	"
Winston,	W. S. Bolling,	Louisville.
Yalabusha,	Walthal & Gollady,	Grenada.
"	Geo. H. Lester,	Coffeeville.
"	B. H. Tabor & H. E. Ware,	Water Valley.
Yazoo,	Miles & Epperson,	Yazoo City.
"	A. M. Harlow,	"
"	Robert Bowman,	"
"	Andrews & Prewett,	"
"	Robert S. Hudson,	"

MISSOURI.

Adair,	Ellison & Ellison,	Kirkville.
"	W. L. Griggs,	"
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	James R. Williams,	Mexico.
"	Wm. O. Forrist,	"
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
Bollinger,	A. C. Ketchum,	Marble Hill.
Boone,	John C. Richardson,	Centralia.
"	Odon Guitar,	"
Buchanan,	J. W. & John D. Strong & J. C.	
"	Hedenberg,	St. Joseph.
"	Doniphan & Baldwin,	"
Butler,	Snoddy & Matthews,	Poplar Bluff.
Caldwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Carroll,	B. D. Lucas,	Carrollton.
Cass,	H. Clay Daniel,	Harrisonville.
"	Samuel D. Benight & O. W. Byrum,	"
"	James Armstrong,	"
Cedar,	W. D. Hoff,	Stockton.
"	James T. Farris,	"
Chariton,	Charles A. Winslow,	Brunswick.
"	Kinley & Kinley,	"
"	Charles Hammond,	"
Clark,	W. H. Robinson,	Cahoka.
"	James M. Asher,	"
"	Park Henshaw,	"
"	Edward T. Smith,	Alexandria.
Clinton,	Charles A. Wright,	Plattsburg.
Cole,	E. S. King & Bro.,	Jefferson City.
"	Alfred M. Lay,	"
Cooper,	John Cosgrove,	Boonville.
Dallas,	Peter Wilson,	Buffalo.
Daviess,	Richardson & Ewing,	Gallatin.
"	James L. Davis,	"
DeKalb,	Samuel C. Loring,	Maysville.
Dent,	G. S. Duckworth,	Salem.
Franklin,	John H. Pugh,	Union.
Gentry,	I. P. Caldwell,	Albany.
Greene,	P. T. Simmons,	Springfield.
"	Frank H. Warren,	"
Grundy,	Daniel Metcalf,	Trenton.
Harrison,	D. J. Heaston,	Bethany.
"	J. H. Phillebaum,	"
Hickory,	Charles Kroff,	Hermitage.
Holt,	T. H. Parriah,	Oregon.
Howard,	J. M. Reid,	Fayette.
Howell,	Wm. H. McCown,	West Plains.
"	Organ & Livingston,	"
Iron,	J. P. Dillingham,	Ironton.
Jackson,	Holmes & Dean,	Kansas City.
"	F. A. Mitchell,	"
"	C. J. Bower.	"
"	John J. Crandall,	"
"	John A. Ross,	"

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
Jackson,	W. W. Cooke,	Kansas City.
Jasper,	Wm. Cloud,	Carthage.
"	Wm. H. Phelps,	"
"	D. A. Harrison,	"
"	A. L. Thomas,	"
Johnson,	N. H. Conklin,	Warrensburg.
"	N. Blackstock,	Knobnoster.
"	H. Martin Williams,	Holden.
Laclede,	J. T. Moore,	Lebanon.
Lafayette,	Ryland & Son,	Lexington.
Lawrence.	Washington Cloud,	Pence City.
Lewis,	F. W. Raah,	Monticello.
"	A. Hamilton,	La Grange.
"	Aaron D. Lewis,	Canton.
"	N. Rollins,	"
Linn,	A. W. Mullins,	Linneus.
"	Thomas Whitaker,	Bucklen.
"	Ell Torrance,	Brookfield.
Livingston,	Collier & Mansur,	Chillicothe.
"	John M. Boyd,	"
Macon,	A. J. Williams,	Macon City.
"	John Shepperd,	"
Madison,	B. B. Cahoon,	Frederickton.
Maries,	Johnson & Rittenhouse,	Vienna.
Marion.	Wm. P. Harrison,	Hannibal.
"	John L. Robards,	"
"	R. E. Anderson,	Palmyra.
McDonald,	A. H. Kennedy,	Pineville.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isaiah Latchem,	Oakhurst.
"	John S. Lumpkin,	Locust Mound.
Moniteau,	Moore & Williams,	California.
"	C. M. Gordon,	"
Monroe.	A. F. Livingston,	Monroe City.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Madrid.
Newton,	Jno. C. Trigg,	Neosho.
"	Jno. A. Wilson,	"
Osage,	S. Mosby,	Linn.
Pemiscot,	James Montgomery,	Gayoso.
"	John A. Averill,	"
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
"	C. H. Frost,	"
Pike,	Fagg & Dyer,	Louisiana.
"	A. L. Loucks,	"
Platte,	James J. Hitt,	Weston.
Polk,	James G. Simpson,	Boliver.

MISSOURI—Continued.

COUNTY.	NAME.	POST OFFICE.
laski,	William Rollins,	Waynesville.
tnam,	Hyde & Christy,	Unionville.
lla,	E. W. Southworth,	New London.
"	John McGown,	"
"	Richard Dalton,	"
ndolph,	Porter & Rothwell,	Huntsville.
line,	John W. Bryant,	Marshall.
"	Saml. Davis,	"
tt,	J. H. Moore,	Commerce.
"	Marshall Arnold,	"
annon,	G. F. Chilton,	Pine Hill.
Francois,	F. M. Carter,	Farmington.
Genevieve,	Charles C. Rozier,	St. Genevieve,
Louis,	Lewis & Daniel, 571½ Chestnut St.,	St. Louis,
"	Bereman & Smith, cor. 4th & Olive,	"
"	Wm. S. Field,	"
"	Thos. B. Childress,	"
"	Pearson & O'Rourke, room 18, Ins.	"
"	Exchange Building,	"
"	Ash & Smith, 314 Nor. 3rd. Street.	"
"	C. P. Ellerbe, 211 Nor. 3rd. Street.	"
"	Geo. W. Griffin,	"
"	W. H. Horner, 203 Pine Street.	"
"	Matthew O'Reilly, 324 Nor. 3rd. St.	"
"	Jno. F. Lee, Jr., 317 Pine St.	"
"	Theodore Hunt, 104 Nor. 4th St.	"
ddard,	Hicks & McKeon,	Bloomfield.
llivan,	S. F. Harvey,	Milan.
ney,	J. J. Brown,	Forsyth.
mon,	J. K. Hansbrough,	Nevada.
"	Scott & Stone,	"
arren,	Frank T. Williams,	Warrenton.

MONTANA.

gerton,	W. E. Cullen,	Helena.
dison,	Samuel Word,	Virginia City.

NEBRASKA.

e,	Maxwell & Chapman,	Plattsmouth.
inson,	Charles A. Holmes,	Tecumseh.
maha,	Jarvis S. Church,	Brownsville.
tte,	Leander Gerrard,	Columbus.

NEVADA.

mboldt,	Patrick H. Harris,	Unionville.
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NEW HAMPSHIRE.

shire,	E. M. Forbes,	Winchester.
laboro,	G. Y. Sawyer & Sawyer, Junior,	Nashua.

NEW JERSEY.

COUNTY.	NAME.	Post Office.
Atlantic,	Alex. H. Sharpe,	Alesecon.
Essex,	John W. Taylor,	Newark.
Mercer,	Leroy H. Anderson,	Princeton.
Middlesex,	James H. Van Cleef,	New Brunswick.
Monmouth,	Charles Haight,	Freehold.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Davis,	Somerville.
Sussex,	Robert Hamilton,	Newton.

NEW MEXICO.

Frank Springer,	Cimarron.
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NEW YORK.

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicotville.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabethtown.
Franklin,	Horace A. Taylor,	Malone.
Fulton,	McCarty & Parke,	Gloversville.
Genesee,	J. G. Johnson,	Batavia.
Greene,	Rufus W. Watson,	Catskill.
Kings,	P. S. Crooke,	Brooklyn.
Livingston,	Geo. W. Daggett,	Nunda.
Monroe,	H. & G. H. Humphrey,	Rochester.
New York,	Broome & Broome,	New York,
"	Morrison, Lanterbach & Spingarn,	^{10 Wall Street.} New York.
"	Charles O'Connor,	^{200 Broadway.} New York.
"	Richard O'Gorman,	"
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
"	W. W. Oxx,	Bath.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	King & Montgomery,	Ithica.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

NORTH CAROLINA.

Alamance,	G. F. Bason,	Graham.
Alleghany,	E. L. Vaughan,	Gap Civil.
Anson,	R. Tyler Bennet,	Wadesboro.
"	John D. Pemberton,	"
Bertie,	James L. Mitchell,	Windsor.
"	Joseph B. Cherry,	"
Bladen,	R. H. & C. C. Lyon,	Elizabethtown.
Buncombe,	A. T. & T. F. Davidson,	Asheville.

NORTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
Buncombe,	Wm. M. Cocke, Jr.,	Ashville.
"	W. E. Weaver,	"
"	Melvin E. Carter,	"
"	E. R. Hampton,	"
Burke,	A. C. Avery,	Morganton.
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.
"	John L. Chamberlain,	"
"	G. G. Luke,	Camden C. H.
Caswell,	Geo. N. Thompson,	Leasburg.
Catawba,	John F. Murrill,	Hickory Tavern.
"	John B. Hussey,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
"	Henry A. London, Jr.,	"
"	James H. Headen,	"
Cherokee,	John Rolan,	Murphey.
"	P. C. Hughes,	Cherokee.
Columbus,	J. W. Ellis,	Whiteville.
Craven,	Henry R. Bryan,	New Berne.
"	H. C. Whitehurst,	"
"	L. J. Moore,	"
Cumberland,	Jas. C. MacRae,	Fayetteville.
Currituck,	P. H. Morgan,	Indian Ridge.
Davidson,	F. C. Robbins,	Lexington.
"	John H. Welborn,	"
Duplin,	Wm. A. Allen & Son,	Kenansville.
Edgecomb,	W. H. Johnston,	Tarboro.
"	John S. Bridgers & Son,	"
"	H. L. Staton, Jr.,	"
Forsythe,	D. P. Mast,	Winston.
Franklin,	Wm. K. Barham,	Louisburg.
Gates,	Geo. E. Gatling,	Sunburg.
"	M. L. Eure,	Gatesville.
Granville,	John W. Hays,	Oxford.
"	Geo. Badger Harris,	Henderson.
Greene,	W. J. Rasberry,	Snow Hill.
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Halifax C. H.
"	E. Tyler Branch,	Enfield.
"	Wm. H. Day,	Halifax.
"	Daniel Bond,	Enfield.
"	W. H. Kitchin,	Scollard Neck.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Henderson,	John D. Hyman,	Hendersonville.
Hertford,	Thos. R. Jernigan,	Harrellsville.
Hyde,	Louis H. Barrow,	Middleton.
Jackson,	James R. Love,	Webster.
Macon,	K. Elias,	Franklin.

NORTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
Martin,	Abner S. Williams,	Williamston.
"	Jos. T. Waldo,	Hamilton.
"	Henry P. Pugh,	"
McDowell,	W. H. Malone,	Marion.
Mecklenberg,	W. P. Bynum,	Charlotte.
"	R. D. Osborne,	"
"	O. Dowd,	"
New Hanover,	Alex. T. Loudon,	Wilmington.
"	W. R. Empie,	"
Northampton,	David A. Barnes,	Jackson.
"	W. W. Peebles,	"
"	Robert I. Beale,	Potocasi.
"	Thomas J. Person,	Garysburg.
Onalow,	Richard W. Nixon,	Jacksonville.
Orange,	Graham & Graham,	Hillsboro.
"	Samuel H. Webb,	Oaks.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth City.
"	James P. Whedbee,	"
"	Wm. F. Martin,	"
Perquimans,	J. M. Albertson,	Hertford.
"	T. G. Skinner,	"
Person,	Samuel C. Barnett,	Roxboro.
"	J. J. Lansdell,	"
Pitt,	Johnston & Nelson,	Greenville.
"	S. S. Wallace,	"
Richmond,	Gilbert M. Patterson,	Laurensburg.
Rockingham,	Reid & Settle,	Wentworth.
"	S. Ferd. Watkins,	"
Rowan,	Blackmer & McCorkle,	Salisbury.
"	James E. Kerr,	"
Sampson,	Milton C. Richardson,	Clinton.
Stokes,	A. H. Joyce,	Danbury.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.
"	Wm. H. Battle & Son,	"
"	Lewin W. Barringer,	"
"	Quentin Busbee,	"
"	R. W. York,	Morrison.
Watauga,	Hervey Bingham,	Boone.
Wilkes,	L. L. Witherspoon,	Wilkesboro.
Yadkin,	John A. Hampton,	Hamptonville.
"	Alford N. Smith,	Yadkinville.

OHIO.

Adams,	F. D. Bayless,	West Union.
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapacneta.
Belmont,	M. D. King,	Barnesville.

O H I O—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Brown,	Baird & Young,	Ripley.
Crawford,	Thomas Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington C. H.
Franklin,	John G. McGuffey,	Columbus.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randall,	Cincinnati.
"	Moulton & Johnson,	"
"	Henry Stanberry,	"
"	A. Taft & Sons,	"
"	Rufus King,	"
"	Stanley Mathews,	"
"	Thomas T. Heath,	"
"	Benj. Butterworth,	"
"	Hoadley & Johnson,	"
"	Archer & McNeil,	"
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Mahoning,	Landon Masten,	Canfield.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Lewis,	Medina.
Meigs,	J. P. Bradbury,	Pomeroy.
Miami,	Walter S. Thomas,	Troy.
Montgomery,	J. A. McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnellsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville.
Pike,	J. J. Green,	Waverly.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Shaefer,	Canton.
Tuscarawas,	A. L. Neely,	New Philadelphia.
Washington,	Knowles, Alban & Hamilton,	Marietta.

O R E G O N.

Baker,	L. O. Sterns,	Baker City.
Douglas,	W. R. Willis,	Roseburg.

P E N N S Y L V A N I A.

Alleghany,	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.

PENNSYLVANIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
"	Roger Sherman,	Titusville,
Elk,	George A. Rathburn,	Ridgeway.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	McDowell & Litman,	Uniontown.
Indiana,	J. N. Banks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Montour,	Isaac X. Grier,	Danville.
Northampton,	M. Hale Jones,	Easton.
Perry,	Lewis Potter.	New Bloomfield.
Philadelphia,	Wm. Henry Rawle,	Philadelphia.
Pike,	John Nyce,	^{710 Walnut Street.} Milford.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

SOUTH CAROLINA.

Abbeville,	Perrin & Cothran,	Abbeville, C. H.
Aikin,	Wm. S. Tillinghast,	Aiken,
"	G. W. Croft,	"
"	J. C. Davant,	Allendale,
Anderson,	J. S. Murray,	Anderson C. H.
"	B. F. Whitner,	"
Barnwell,	Samuel J. Hay,	Barnwell.
"	John J. Maher,	"
"	Finley & Henderson,	Aiken.
"	H. M. Thompson,	Williston.
"	James Thomson,	Blackville.
"	Izlar, Dibble & Dibble,	Bamberg.
Beaufort,	C. J. C. Hutson,	Yemassee.
"	W. J. Verdier,	Beaufort.
"	Chas. E. Bell,	Grahamville.
Charleston,	Memminger, Pinckney & Jervey,	Charleston.
"	M. L. Wilkins,	"
"	Brewster, Sprat & Burke,	"
"	Corbin & Stone.	"
"	Wilmot G. DeSaussure,	"
"	Simons & Siegling,	"
"	Magrath & Lowndes,	"
"	Simonton & Barker,	"
"	Asher D. Cohen,	"
"	Walker & Bacot,	"
"	Simons & Simons,	"
"	Whaley & Mitchell,	"

SOUTH CAROLINA—Continued.

COUNTY.	NAME.	POST OFFICE.
Charleston,	C. Richardson Miles,	Charleston.
"	I. N. Nathans,	"
"	Wm. Tennent,	"
"	Thomas M. Hancel,	"
"	Rutledge & Young,	"
Chesterfield,	W. L. T. Prince,	Cheraw.
"	McIvor & Malloy,	"
Clarendon,	Haynesworth, Fraser & Barron,	Manning.
"	Joseph F. Rhame,	"
Colleton,	Williams & Fox,	Waterboro'.
Darlington,	McIver & Boyd,	Darlington C. H.
"	J. J. Ward,	"
Edgefield,	Thomas P. Magrath,	Edgefield C. H.
"	J. C. Sheppard,	"
Fairfield,	James H. Rion,	Winnaboro'.
Greenville,	Earle & Blythe,	Greenville.
"	Jas. P. Moore,	"
"	Isaac M. Bryan,	"
"	Arthur & Arthur,	"
Horry,	Tom F. Gillespie,	Conwayboro.
"	Jos. T. Walsh,	"
Kershaw,	Kershaw & Kershaw.	Camden.
Lancaster,	W. A. Moore,	Lancaster.
Marlborough,	Hudson & Newton,	Bennettsville.
Newberry,	Jones & Jones,	Newberry.
"	Johnstone & Harrington,	"
Orangeburg,	W. J. DeTreville,	Orangeburg.
"	Malcolm Browning,	"
"	Islar & Dibble,	"
"	H. Powell Cooke,	St. Matthews.
Oconee,	J. H. Whitner,	Walhalla.
Pickens,	Whitner Symmes,	"
"	Spartan D. Goodlet,	Pickens C. H.
"	Holcombe & Child,	"
Richland,	Melton & Clark,	Columbia.
"	F. W. McMaster,	"
"	Arthur & Boone,	"
"	Pope & Haskell,	"
"	Talley & Barnwell,	"
"	Melton & Chamberlain,	"
Spartanburg,	J. M. Elford,	Spartanburg.
"	Duncan & Cleveland,	"
Sumpter,	Richardson & Son,	Sumpter.
Union,	Robert W. Shand,	Union.
"	William Munro,	"
Williamsburg,	Thomas M. Gilland,	Kingtree.
"	S. W. Maurice,	"
York,	Clawson & Thomson,	Yorkville.

TENNESSEE.

COUNTY.	NAME.	POST OFFICE.
Bedford,	H. L. & R. B. Davidson,	Shelbyville.
"	Edmund Cooper,	"
"	Coldwell & Waters,	"
Benton,	W. F. Doherty,	Camden.
Bledsoe,	S. B. Northrup,	Pikeville.
Blount,	Sam. P. Rowan,	Marysville.
"	McGinley & Hood,	"
"	C. T. Cates,	"
Bradley,	J. N. Aiken,	Charleston.
"	P. B. Mayfield,	Cleveland.
"	J. H. Gaut,	"
"	R. M. Edwards,	"
Cannon,	Burton & Wood,	Woodbury.
"	F. S. Singletary,	Elizabethton.
"	Butler & Emmert,	"
"	H. M. Folsom,	"
Carroll,	James P. Wilson,	Huntingdon.
"	Hawkins & Towns,	"
Coffee,	W. P. Hickerson,	Manchester.
"	Iraby C. Stone,	"
Cheatham,	L. J. Lowe,	Ashland City.
"	S. D. Power,	"
Cocke,	McSween & Son,	Newport.
Davidson,	Neill S. Brown, Jr.,	Nashville.
"	E. F. Estes,	"
"	J. R. Hubbard,	"
"	Allen & Covington,	"
"	Ed. Baxter,	"
"	John M. Bass, Jr.,	"
"	Wm. B. Bate,	"
"	Neill S. Brown,	"
"	C. D. Berry,	"
"	J. B. Brown,	"
"	A. L. Demoss,	"
"	Guild & Dodd,	"
"	J. C. & J. M. Gaut,	"
"	Wm. A. Glenn,	"
"	Alex. A. Hall,	"
"	M. B. Howell,	"
"	T. A. Kercheval,	"
"	Philip Lindsley,	"
"	Overton Lea,	"
"	John Lellyett,	"
"	Thomas H. Malone,	"
"	F. C. Maury,	"
"	McClanahan & McAlister,	"
"	A. G. Merritt,	"
"	John Ruhm,	"
"	Wm. B. Reese,	"

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
Davidson,	Baxter Smith,	Nashville.
"	Whitman & Cobb,	"
"	Stubblefield & Childress,	"
"	Thomas M. Steger,	"
"	James Trimble,	"
"	R. S. Tuthill,	"
"	D. F. Wilkin,	"
"	J. L. Rice,	"
"	G. P. Thruston,	"
"	A. S. Colyar & Sons,	"
"	M. Vaughn,	"
"	Frank E. Williams,	"
"	Edward H. East,	"
"	R. McP. Smith,	"
"	Wm. F. Cooper,	"
"	Robert Ewing,	"
"	John & Frank T. Reid,	"
"	Alex. B. Hoge,	"
"	J. T. Brown,	"
"	Andrew Allison,	"
"	Ed. Mulloy,	"
"	Wirt Hughes,	"
"	James D. Park,	"
"	T. W. Haley,	"
Decatur,	James M. Porterfield,	Decaturville.
"	A. A. Steagald,	"
DeKalb,	Nesmith & Bro.,	Smithville.
"	Wm. B. Stokes,	"
Dickson,	McNeiley & Morris,	Charlotte.
Dyer,	A. P. Hall,	Dyersburg.
"	H. W. L. Turney,	"
"	S. R. Latta,	"
"	Charles C. Moss,	"
"	R. A. W. James,	"
Fayette,	John W. Harris,	Somerville.
"	H. C. Moorman,	"
"	Wm. A. Milliken,	"
"	Fred M. Taylor,	"
"	Calvin Jones,	"
Fentress,	W. Adrian Murray,	Jamestown.
Franklin,	Newman & Turney,	Winchester.
"	Williams & Martin,	"
"	Syler & Simmons,	"
"	Colyar & Curtis,	"
"	J. B. Fitzpatrick,	"
Gibson,	G. H. Hall,	Trenton.
"	A. Wise & John S. Cooper.	"
"	Sp'l. Hill,	"
"	M. M. Neil,	"

TENNESSEE—Continued.

COUNTY	NAME.	Post Office.
Giles,	James & W. H. McCallum,	Pulaski.
"	Jones & Ewing,	"
Grainger,	R. M. Barton,	Morristown.
"	James T. Shields,	Bean's Station.
Greene,	A. H. Pettibone,	Greeneville.
"	H. H. Ingersoll,	"
"	Felix A. Reeve,	"
Grundy,	James W. Bouldin,	Altamont.
Hamilton,	M. H. Clift,	Chattanooga.
"	Ben. S. Nicklen,	"
"	V. A. Gaskell,	"
"	Key & Richmond,	"
"	W. L. Aiken,	"
"	Brawner & Mayre,	"
"	Vandyke, Cook & Vandyke,	"
"	Nash Burt,	"
"	Lewis Shepherd,	"
"	Trewhitt & Sharp,	"
"	G. A. Wood,	"
"	Xen Wheeler,	"
"	Tomlinson Fort,	"
"	J. S. Wiltse,	"
Hardeman,	G. W. Hardin,	Bolivar.
"	Jesse Normont,	"
Hardin,	John A. Pitts,	Savannah.
"	Jno. & Jno. D. McDougal,	"
Hawkins,	A. A. Kyle,	Rogersville.
"	F. M. Fulkerson,	"
"	W. F. Kyle,	"
Haywood,	H. B. Folk,	Brownsville.
"	Hall & Williamson,	"
"	E. J. & J. C. Read,	"
"	Benj. J. Lea,	"
"	Wm. F. Talley,	"
"	Willo Haywood,	"
Henderson,	Taylor & Woods,	Lexington.
Henry,	J. N. Thomason,	Paris.
"	Dunlap & Taylor	"
Hickman,	O. A. Nixon,	Centreville.
"	Murphree & Cunningham,	"
Humphreys,	H. M. McAdoo,	Waverly.
"	V. S. Allen,	"
"	H. M. Little,	"
Jackson,	R. A. Cox,	Gainesboro'.
"	Jno. P. Murray,	"
"	M. G. Butler,	"
"	George H. Morgan,	"
Jefferson,	O. C. King,	Mossy Creek.
"	Joel A. Dewey,	Dandridge.

TENNESSEE—Continued.

COUNTY.	NAME.	Post Office.
Knox,	John Baxter,	Knoxville.
"	Chas. H. Flournoy,	"
"	Thornburgh & McGuffey,	"
"	J. H. Crozier & Son,	"
"	George Washington,	"
"	Washburn & Houk,	"
"	Lewis & Comfort,	"
"	M. L. Hall,	"
"	Cocke, Henderson & Tillman,	"
"	D. D. Anderson,	"
"	L. A. Gratz,	"
"	C. E. Lucky,	"
"	T. A. R. Nelson,	"
"	W. J. Hicks,	"
"	T. S. Webb,	"
Lake,	W. H. Adams,	Tiptonville.
Lauderdale,	C. H. Connor,	Ripley.
"	Marley & Steele,	"
"	Lynn & Oldham,	"
"	Wilkinson & Wilkerson,	"
Lawrence,	R. H. Rose,	Lawrenceville.
Lincoln,	Bright & Sons,	Fayetteville.
"	J. H. Holman,	"
"	W. F. Kercheval,	"
"	Jo. G. Carrigan,	"
Macon,	M. N. Alexander,	Lafayette
Madison,	Jno. L. H. Tomlin,	Jackson.
"	Jno. H. Freeman,	"
Marion,	Amos L. Griffith	Jasper,
"	A. A. Hyde,	"
Marshall,	James H. & Thomas F. Lewis,	Lewisburg.
Maury,	Thomas & Barnett,	Columbia.
"	Looney & Hickey,	"
"	Vance Thompson,	"
"	Wright & Webster,	"
"	J. T. L. Cochran,	"
Meigs,	V. C. Allen,	Decatur.
"	T. M. Burkett,	"
Montgomery,	W. A. Quarles,	Clarksville.
"	John P. Campbell,	"
"	John F. House,	"
"	H. C. Merritt,	"
"	H. H. Lurton,	"
"	Jas. E. Bailey,	"
Monroe,	Staley & McCrosky,	Madisonville.
"	H. A. Chambers	"
"	R. Pritchard,	"
"	W. L. Harbison,	Sweetwater.
McMinn,	T. N. Van Dyke,	Athens.

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
McMinn,	Wm. M. Bradford,	Athens.
McNairy,	James F. McKinney,	Purdy.
Obion,	J. G. Smith,	Troy.
"	J. M. Naylor.	Union City.
"	James B. Cox,	Nettle Carrier.
Perry,	James L. Sloan,	Linden.
"	J. P. Ledbetter,	"
Polk,	John C. Williamson,	Benton.
Putnam,	H. Denton,	Cookeville.
Roane,	Samuel L. Childress,	Kingston.
Robertson,	Wm. M. Hart,	Springfield.
"	John E. & A. E. Garner,	"
"	Stark & Judd,	"
"	George R. Scott,	"
Rutherford,	Ridley & Ridley,	Murfreesboro.
"	E. D. Hancock,	"
"	John W. Burton,	"
"	Palmer & Richardson,	"
"	Avent & Childress,	"
Sevier,	G. W. Pickle,	Sevierville.
Shelby,	W. A. Dunlap,	Memphis,
"	H. Townsend,	"
"	Wat. Strong,	"
"	Wm. H. Stephens,	"
"	B. B. Barnes,	"
"	Adams & Dixon,	"
"	Wm. J. Duval,	"
"	J. W. Scales,	"
"	Patterson & Lowe,	"
"	T. S. Ayres,	"
"	W. G. Rainey,	"
"	E. A. Cole,	"
"	Wright & Folks,	"
"	A. J. Martin,	"
"	Luke W. Finlay,	"
"	H. Clay King,	"
"	B. C. Brown,	"
"	R. P. Duncan,	"
"	H. G. Smith,	"
"	Wm. M. Smith,	"
"	Henry Craft,	"
"	C. W. Metcalf,	"
"	Humes & Poston,	"
"	W. L. Scott,	"
"	J. A. Anderson,	"
"	T. W. Brown,	"
"	Myers & Wyatt,	"
"	McFarland & Goodwin,	"
"	R. E. Hutchinson,	"

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
Shelby,	Wilson & Beard, 33 Madison St.,	Memphis.
"	Wm. M. Randolph,	"
"	E. S. Hammond,	"
"	Ellett & Phelan,	"
"	U. W. Miller,	"
"	J. E. Temple,	"
"	Edward L. Belcher,	"
"	John Somervell, 308, 2d St.,	"
"	H. B. Martin,	"
"	Minor Merrewether,	"
"	Hanson, Estes & Dashill,	"
"	M. D. L. Stewart,	"
"	B. P. Anderson,	"
"	George W. Winchester,	"
"	Haynes & Stockton,	"
"	Charles Kortrecht,	"
"	Thos. C. Lowe,	"
"	W. P. Martin,	"
"	Harris & Harris,	"
"	Harris, Pillow & Pillow,	"
"	Estis & Jackson,	"
"	James O'Pierce,	"
"	C. W. Frazier,	"
"	W. L. Duff,	"
"	Wm. B. Street,	"
"	L. D. McKisick,	"
"	L. Lehman,	"
"	T. B. Edgington,	"
"	Walker & Horrigan,	"
"	Gantt & McDowell,	"
Smith,	E. W. Turner,	Carthage.
"	W. H. DeWitt,	"
"	Jos. W. Windle,	"
Sullivan,	W. D. Haynes,	Blountville.
"	D. F. Bailey,	Bristol.
Sumner,	Jas. W. Blackmore,	Gallatin.
"	Wilson & Vertrees,	"
"	J. A. Trousdale,	"
Stewart,	J. M. Scarborough,	Dover.
Tipton,	Thomas B. Carraway,	Covington.
"	Peyton I. Smith,	"
Trousdale,	McMurray & Bennett,	Hartsville.
"	W. J. Neeley,	"
Warren,	J. P. Thompson,	McMinnville.
"	Thos. Murray,	"
Washington,	Felix W. Earnest,	Jonesborough.
"	S. W. Kirkpatrick,	"
"	Akard & Young,	Johnson City.

TENNESSEE—Continued.

COUNTY.	NAME.	POST OFFICE.
Washington,	Robert Love,	Johnson City.
Wayne,	R. P. & Z. M. Cypert,	Waynesboro.
Weakley,	W. P. Caldwell,	Gardner.
"	Charles M. Ewing,	Dresden.
"	S. B. Ayres,	"
"	John Somers,	"
Williamson,	Hicks & Magness,	Franklin.
"	Miller & Fowlkes,	"
"	T. W. Turley,	"
"	David Campbell,	"
Wilson,	Tarver & Gollady,	Lebanon.
"	Andrew B. Martin,	"
"	Jordan & Jas. F. Stokes,	"
"	R. L. Caruthers,	"
"	J. W. Phillips,	"
"	R. Cantrell,	"
"	R. M. Johnson,	Round Top.

TEXAS.

Anderson,	J. N. Garner,	Palestine.
"	Bush & McClure,	"
Angelina,	H. G. Lane,	Homer.
Aransas,	Wm. W. Dunlap,	Rockport.
"	J. Williamson Moses,	"
Atascosa,	W. H. Smith,	Pleasanton.
Austin,	Ben. T. & Charles A. Harris,	Bellville.
"	Jas. H. Shelburn,	Industry.
Bandera,	H. C. Duffy,	Bandera City.
Bastrop,	Fowler & Wilkes,	Bastrop.
Bell,	McGinnis & Lowry,	Belton.
"	A. J. Harris,	"
"	Saunders & Holman,	"
Bexar,	Thomas M. Paschall,	San Antonio.
"	S. G. Newton,	"
Bosque,	Henry Fossett,	Meridian.
"	Bean & Emerson,	"
"	J. K. Helton,	Clifton.
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbia.
"	Abner S. Lathrop,	Brazoria.
"	Munson & Shapard,	Columbia.
"	W. Forp. Smith,	"
"	Eugene J. Wilson,	"
Brazos,	John Henderson,	Bryan.
"	Page & Simms,	"
"	G. I. Goodwin,	"
Brown,	H. B. Tarver,	Brownwood.
"	Gallatin Brown,	"
"	Mays & Newton,	"

TEXAS—Continued.

COUNTY.	NAME.	POST OFFICE.
Brown,	Stephens & Lessing,	Brownwood.
Burk,	James H. Jones,	Henderson.
Burleson,	A. W. McIver,	Caldwell.
Burnet,	W. A. Blackburn,	Burnett.
Caldwell,	Nix & Storey,	Lockhart.
"	M. R. Stringfellow,	"
Calhoun,	John S. Givens,	Indianola.
"	W. H. Woodward,	"
"	Wm. H. Crain,	"
Cameron,	Powers & Maxan,	Brownsville.
Cherokee,	Sam. A. Wilson,	Bush.
Collin,	R. J. Browning,	McKinney.
"	R. C. White,	"
Colorado,	Harcourt & Harcourt,	Columbus.
"	Delaney & Fleming,	"
"	James W. Smith & Rowan Green,	"
Comac,	James M. Taylor,	New Braunfels.
Comanche,	John D. Stephens,	Comanche.
"	Jo. G. Hardin,	"
Cook,	C. C. Potter,	Gainesville.
"	Weaver & Bordeaux,	"
Coryelle,	J. C. Jenkins,	Gatesville.
"	W. O. Campbell,	"
Dallas,	John M. Crockett,	Dallas.
"	W. M. Edwards,	"
"	F. M. Hanks,	"
"	Barksdale & Eblen,	"
"	W. H. Price,	"
"	Robert B. Seay,	"
"	Wm. C. Wolff,	"
Denton,	Jackson & Downing,	Denton.
"	Carroll & Mullen,	"
"	Wm. P. Mayes,	"
"	Fogler & McConnell,	"
Ellis,	W. H. Griffin,	Ennis.
"	E. P. Anderson & Bro.,	Waxahachie.
"	H. N. C. Davis,	"
"	H. H. Sneed,	"
El Paso,	P. J. Walker,	El Paso.
"	C. H. Howard,	"
"	Saml. Duncan,	San Elizario.
Erath	John W. Cartwright,	Stephensville.
Falls,	Wm. R. Reagan,	Marlin.
"	M. C. Smith,	"
"	Thomas D. Williams,	"
"	T. P. & B. L. Aycock,	"
Fannin,	Roberts & Semple,	Bonham.
"	W. A. Evans,	"

TEXAS.—Continued.

COUNTY.	NAME.	POST OFFICE.
Fayette,	John C. Stiehl,	La Grange.
"	Isaac Sellers,	"
"	Moore & Ledbetter,	"
Fort Bend,	R. J. Calder,	Richmond.
"	Pearson & Croom,	"
Freestone,	O. C. Kirven,	Fairfield.
"	Theo. G. Jones,	"
Galveston,	Chas. Olfton,	Galveston.
"	Willie & Cleveland,	"
"	Joseph & Kittrell,	"
"	Hays & Hays,	"
"	Mann & Baker,	"
"	T. N. Waul,	"
"	Harris & Masterson,	"
"	Edward Collier,	"
"	G. W. Le Vin,	"
Goliad,	Jas. S. Furguson,	Goliad.
Gonzales,	Harwood & Conway,	Gonzales.
"	A. S. Chevalier,	"
Grayson,	Woods & Cowles,	Sherman.
"	John D. Pope,	"
"	Thos. C. & Jas. K. Bass,	"
Grimes,	McDonald & Meachem,	Anderson.
Guadaloupe,	Washington E. Goodrich,	Seguin.
"	John Ireland,	"
"	Alexander Henderson,	"
Harris,	Crosby & Hill,	Houston.
"	James Masterson,	"
"	Henry Bradshear,	"
"	R. G. Rawley,	"
"	Henderson & Cook,	"
"	J. B. Linkens,	"
"	W. P. & E. P. Hamblen,	"
"	W. S. Oldham,	"
"	C. Anson Jones,	"
"	Stewart & Barziza,	"
Harrison,	J. B. Williamson,	Marshall.
"	W. H. Pope,	"
"	Hall & Lipscomb,	"
"	Wm. Stedman,	"
Hays,	Yoe & Brown,	San Marco.
"	W. O. Hutchison,	"
Henderson,	Thos. D. Evans,	Athens.
Hidalgo,	L. H. Box,	Edinburgh.
Hill,	Wm. B. Tarver,	Hillboro.
Hopkins,	Saml. J. Hunter,	Sulphur Springs.
Houston,	D. A. Nunn,	Crockett.
"	Mark Miller,	"
"	S. A. Miller,	"

T E X A S.—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Hunt,	Sam. Davis,	Greenville.
"	S. S. Weaver,	"
"	W. C. Jones,	"
"	James A. Poage,	"
Jack,	Thomas Ball,	Jacksboro.
"	A. R. Bennett,	"
Jasper,	Moulton & Doom,	Jasper.
Jefferson,	J. K. Robertson,	Beaumont.
"	Tom J. Russell,	"
Johnson,	Hazlewood & English,	Cleburne.
"	Benjamin F. Bledsoe,	"
"	B. D. Simpson,	"
"	M. A. Oatis,	"
"	D. T. Bledsoe,	"
Jarnes,	Lawhon & Bookhout,	Helena.
Kaufman,	Manion & Adams,	Kaufman.
"	H. W. Kyser,	"
"	R. F. Slaughter,	"
"	W. A. Hindman,	"
Kerr,	R. F. Crawford,	Kerrsville.
Lamar,	S. B. Maxey,	Paris.
"	James B. Davis,	"
Lampasas,	White & Gibson,	Lampasas.
Lavaca,	H. B. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
"	Johnston, Barnes & Weir,	Jewett.
Limestone,	Prendergrast & Davis,	Springfield.
"	J. T. Ratcliff,	Tehuacana.
Madison,	M. Y. Randolph,	Madisonville.
Marion,	Crawford & Crawford,	Jefferson.
"	Penn & Todd,	"
"	W. G. Irwin,	"
"	John Penman,	"
"	M. F. Moore,	"
McLennan,	Flint, Chamberlin & Graham,	Waco.
"	F. H. Sleeper,	"
"	West & Prather,	"
"	R. W. Davis,	"
"	Wm. W. Kendall,	"
"	David H. Hewlett,	"
"	Thos. Harrison,	"
"	Andrew J. Evans,	"
Menard,	Chris. C. Callan,	Menardville.
Milam,	G. R. Smith,	Cameron.
"	Tarver & Martin,	"
"	F. M. Adams,	"
Montague,	Jackson & Grigsby,	Montague.

TEXAS.—Continued.

COUNTY.	NAME.	POST OFFICE.
Montague,	John H. Stephens,	Montague.
"	Hagler & Morris,	"
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Corsicana.
"	Uphaw, Frost & Barry,	"
"	N. C. Read,	"
Newton,	John T. Stark,	Newton.
Nueces,	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Panola,	Ben. M. Baker,	Carthage.
"	Augustus M. Carter,	"
Parker,	R. W. S. Shepherd,	Weatherford.
"	J. H. Harberger,	"
Polk,	J. M. Crosson,	Livingston.
Red River,	Geo. F. Conly,	Clarksville.
"	Jas. H. Clark,	"
"	R. R. Gaines,	"
Refugio,	Chas. A. Russell,	St. Maries.
Rusk,	C. B. Kilgore,	Kilgore.
"	Drury Field,	Henderson.
Sabine,	J. M. Watson,	Hemphill.
"	Wm. W. Weatherred,	Milam.
San Augustine,	S. B. Bewley,	San Augustine.
San Jacinto,	Cleveland & Lea,	Cold Springs.
"	W. B. Denson,	"
San Saba,	Geo. B. Cooke,	San Saba.
Shackelford,	C. K. Stribling,	Fort Griffin.
Shelby,	D. S. & E. F. Canisahan,	Center.
Smith,	S. T. Newton,	Tyler.
"	Charles W. Stocker,	"
"	Stephen Reaves,	"
"	Robertsons & Heverdon,	"
"	Jones & Henry,	"
Starr,	B. B. Seat,	Rio Grande City.
Tarrant,	Hendricks & Smith,	Fort Worth.
"	B. B. Paddock,	"
"	John F. Swayne,	"
"	Bedford Brown,	"
"	W. M. Campbell,	"
Titus,	Henry Dillahunt,	Mount Pleasant.
Travis,	Ghandler & Carleton,	Austin.
"	Archer & Moore,	"
"	Hancock & West,	"
"	Shepard, Searcy & Shepard,	"
"	W. R. Wallace,	"
"	A. M. Jackson,	"
"	M. A. Long,	"
"	Miller & Dowell,	"

TEXAS—Continued.

COUNTY.	NAME.	POST OFFICE.
Travis,	G. Davis,	Austin.
"	Chandler, Carleton & Robertson,	"
"	Jas. B. Morris,	"
"	J. W. Cunningham,	"
"	D. E. Thomas,	"
"	Smith & James,	"
Trinity,	S. S. Robb,	Sumpter.
"	J. P. Stevenson,	Trinity Station.
Upsher,	J. L. Camp,	Gilmer.
"	James & McCord,	Longview.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Phillips, Lackey & Stayton,	Victoria.
Washington,	P. H. & J. T. Swearingen,	Benham.
"	W. H. Billingslea,	Chapel Hill.
"	O. T. Holt,	Burton.
"	J. W. Stone,	Chapel Hill.
Webb,	H. C. Peterson,	Laredo.
Wharton,	Geo. Quinan,	Wharton.
Williamson,	Coffee & Henderson,	Georgetown.
"	McTeaden & Fisher,	"
"	E. T. Allen,	Fris City.
Wise,	Booth & Ferguson,	Decatur.
Wood,	J. J. Jarvis,	Quitman.
"	B. B. Hart,	"

UTAH.

Great Salt Lake,	Fitch & Mann,	Salt Lake City.
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VERMONT.

Caledonia,	Belden & May,	St. Johnsbury.
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VIRGINIA.

Accomack,	Gunter & Gillet,	Accomack C. H.
"	T. H. B. Browne,	Accomac.
Albemarle,	Blakey & Rierson,	Charlottesville.
"	Thomas L. Michie,	"
"	Micajah Woods,	"
"	Wm. J. Robertson,	"
"	Thomas S. Martin,	Scottsville.
Alexandria,	Ball & Mushbach,	Alexandria.
"	John M. Johnson,	"
Amherst,	Rich'd. M. Taliaferro,	Amherst C. H.
"	H. M. Wharton,	"
Appomattox,	E. R. Woodson,	Pamplina.
Augusta,	Effinger & Craig,	Staunton.
"	S. Travers Phillips,	"
Botetourt,	F. H. Mays,	Fincastle.
"	W. A. Glasgow	"
"	Edmund Pendleton,	Buchanan.

VIRGINIA—Continued.

COUNTY.	NAME.	POST OFFICE.
Buckingham,	N. F. Bocock,	Buckingham.
"	Wm. M. Cabell,	"
"	W. Merry Perkins,	Buckingham C. H.
"	D. J. Woodfin,	New Canton.
Campbell,	Wm. & J. W. Daniel,	Lynchburg.
"	Don P. Halsey,	"
"	John B. Robinson,	"
"	Edw'd. D. Christian,	"
"	John C. Murrell,	Campbell C. H.
Carroll,	Norman Hale,	Hillsville.
Caroline,	Washington & Chandler,	Bowling Green.
Charlotte,	Thos. E. Watkins,	Charlotte C. H.
"	John M. Bouldin,	"
Clark,	A. Moore, Jr.,	Berryville.
"	James W. Marshall,	New Castle.
Culpepper,	A. R. Alcocke,	Culpepper.
"	Edward Cunningham,	Brandy Station.
Cumberland,	Sam'l F. Coleman,	Oak Forrest.
"	W. M. Cooke,	Cumberland C. H.
Dinwiddie,	Watkins & Cocke,	Petersburg.
"	Sam'l. D. Davies,	"
"	Drury A. Hinton,	"
"	E. M. Cox,	"
"	Friend & Davis,	"
"	H. J. Heartwell,	Goodwynsville.
Elizabeth City,	G. M. Peek,	Hampton.
Fairfax,	H. W. Thomas,	Fairfax C. H.
Farquier,	Hugh B. Garden,	Warrenton.
Fluvanna,	Wm. B. Pettit,	Palmyra.
"	Thomas H. Tutwiller,	"
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
"	L. T. Moore,	"
Gloucester,	J. T. & J. H. Seawell,	Gloucester.
"	Perrin Kemp,	"
Grayson,	Cornett & Cecil,	Independence.
Greene,	R. S. Thomas,	Stanardsville.
Greenville,	W. S. Goodwyn,	Hicksford.
Halifax,	Armistead Barkedale,	Meads ville.
Hanover,	W. R. Winn,	Ashland.
"	Haw & Jones,	Hanover C. H.
Henrico,	George L. Christian,	Richmond.
"	John Hunter, Jr.,	"
"	Alfred Morton,	"
"	John H. Gilmer,	"
"	Wm. J. Clopton,	"
"	James N. Dunlop,	"
House,	H. & P. H. Dillard,	Franklin.
Ile of Wight,	R. F. Graves, Jr.,	Smithfield.
King William,	B. B. Douglas,	Ayletta.

VIRGINIA.—Continued.

COUNTY.	NAME.	POST OFFICE.
King William,	Wm. E. Hart,	West Point.
"	T. O. Dabney,	Lanesville.
King and Queen,	L. A. Tyler,	King & Queen C. H.
Lancaster,	B. H. Robinson,	Lancaster.
Lee,	David Miller,	Jonesville.
"	M. B. D. Lane,	"
Loudon,	John M. Orr,	Leesburg.
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Norfolk,	Hinton, Goode & Chaplain,	Norfolk.
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"	Godwin & Crocker,	Portsmouth.
"	A. S. Watts,	"
Page,	Richard S. Parks,	Luray.
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"	G. J. Holbrook,	"
York,	M. Tredway Hughes,	Yorktown.

WASHINGTON TERRITORY.

Jefferson,	B. F. Dennison,	Port Townsend.
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Berkeley,	Blackburn & Lamon,	Martinsburg.
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"	A. Mitchell Warner,	Huntington.
Fayette,	Theophilus Gaines,	Fayette C. H.
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Harrison,	Gideon D. Camden,	Clarksburg.
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Mason,	W. H. Tomlinson,	Point Pleasant.
Mineral,	George A. Tucker,	Piedmont.
Monongalia,	Willey & Son,	Morgantown.
Morgan,	J. Rufus Smith,	Berkeley Springs.
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Washington,	Frisby & Weil,	West Bend.

Review Notices.

What the Bench and Bar Says of It.

Hon. E. H. Stiles, Ottumwa, Iowa, Feb., 6th, 1873, says: "I regard your REVIEW as second to none in America."

Hon. Jas. Somerville, Carrollton, Miss., May 1st, 1873, says: "Judge Cooper's articles alone are worth the price of subscription."

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THE
SOUTHERN LAW REVIEW,

—AND—

CHART OF THE SOUTHERN
LAW REVIEW UNION.

OCTOBER, 1873.

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ENGLISH AND FRENCH LAW.

NUMBER FOUR.

The period of my stay in Europe was quite prolific in what the French style, "Causes Celebres," legal cases of more than ordinary interest, either on account of the rank of the parties, the nature and amount of the property involved, or the peculiarity of the facts. It may not be uninteresting to notice some of the more striking of these cases.

When I first reached Europe, the English newspapers were all taken up in discussing the case of Wm. Roupell, a late member of Parliament from London, who was about to be put upon trial for forgery. This man was the eldest son of an individual who had arisen from the dregs of the people, but, by industry and economy, had amassed a large fortune. Wm. Roupell was the favorite child of both his parents, and enjoyed their unlimited confidence. He was of good address, popular manners, and acquired the reputation of being a successful man of business in the stock market and at the Bourse. He lived high, spent money freely, and was borne in triumph into Parliament by a metropolitan constituency. In the meantime, his father died, leaving, it was supposed, a will giving all his property to his wife, over whom the oldest son continued to have unlimited control. For some time longer, the new member of Parliament pursued his course of extravagance and speculation, and was looked upon as a successful financier, and rising politician. Suddenly the bubble burst, and the late cynosure of all eyes was compelled to fly to the

Continent to avoid his creditors. He had spent large sums of money raised upon what were supposed to be mortgages executed by his father during his lifetime, and equally large sums raised by sales of property made by his mother at his instance.

Now comes the remarkable part of the story. It began to be bruited about that the supposed will of the elder Roupell, and the supposed mortgages in his name were forgeries. It was also circulated for the first time that Wm. Roupell was an illegitimate child, and that his parents had not intermarried until some years after his birth. If these were the true facts, the mortgages by the elder Roupell, and the sales by his widow, were equally void, and the property supposed to have been conveyed by them belonged, in reality, to the children born after the marriage of the elder Roupell. Suits were accordingly instituted by the children to recover the property, and, strange to say, Wm. Roupell returned to England and delivered himself up to be tried for forgery, alleging that he was influenced to this course by remorse of conscience, and a desire to see the real heirs of his father restored to their rights. He was, therefore, tried for the forgery of the documents mentioned, and, upon his plea of guilt and full confession, sentenced to penal servitude for a term of years, and has been since serving out his term with other criminals.

Afterwards, upon the trial of the suits brought by his younger brothers for the recovery of the property, he was introduced as a witness on their behalf, and gave a full and explicit statement of the forgery of the mortgages and will, and the means he had adopted to effect his purposes. The whole story is one of the marvels of crime, before which the wildest fable wrought by the imagination of the writers of sensation fiction would seem tame.

The value of the property involved was, however, too large to be lost without a struggle, and a most determined effort was made to cast suspicion on the whole story. It was alleged that Wm. Roupell, having wasted the fortune amassed by his father, and finding his family reduced to poverty and himself a fugitive without means of support, had devised the new story in order to return the property to his family. It was urged that his condition as a penniless exile was worse than it could be as a convicted criminal with rich relations, who would do all they could to mitigate the situation of him to whom they owed their fortune, and who might eventually secure his pardon.

Both versions are equally romantic and outside of the ordinary experience of life. That a series of forgeries of documents, around

the execution of which the English law endeavors to throw sufficient guards to prevent falsification, should have been successfully perpetrated so as to deceive learned counsel and sharp-sighted business men, and kept concealed until the guilty party chose himself to make a disclosure, was certainly hard to be believed; but it was equally trying to the credulity that a man who had rolled in wealth, and taken his place among the high of the land, should be willing to spend the best years of his life in the hulks, in order to enrich his family by perjury. On either view, we are lost in amazement, and are fain to say that "truth is strange, stranger than fiction."

Under these circumstances, it is not surprising that the jury failed to agree. The outside testimony went so far to sustain Wm. Roupell's story, that some of the parties against whom suit had been brought, compromised with the plaintiffs. And, although it was said that others refused to come to terms, it is probable that some agreement was finally entered into, for the suits have never been brought to trial.

Another suit which was, at that time, largely engaging the public attention, was that of two of the clerical authors of the famous *Essays and Reviews*, in the Ecclesiastical Court. The proceedings were instituted to deprive these writers, Williams and Wilson, of their position in the Church, or, at any rate, to subject them to censure and discipline for heterodox opinions developed in these *Essays*. The book itself was an attempt to transplant German rationalism upon some leading dogmas of theology, into the English ecclesiastical world. The laity of the English Church had been gradually becoming familiar with the new views, but the clergy had heretofore abstained from the dangerous field.

There is no doubt that a disbelief in the prevalent dogmas of theology, coupled at the same time with a sincere belief in the moral teachings of the founder of Christianity, has been on the increase among the intellectual thinkers of Europe. The clergy of Germany and Switzerland, it is notorious, have participated in the new movement, and been active in its spread. This phase of unbelief is far more dangerous to the hierarchy than the infidelity of the last century. Bolingbroke and Voltaire struck at Christianity, not at the clergy alone, and sought to establish pure deism based on reason, and utterly rejected revealed religion. The modern infidel—if the word infidel is applicable to him who merely disbelieves some of the dogmas of theology while he professes implicit faith in the principles of religion and in the founder of Christianity as their great expounder—

profess no fellowship with their more radical predecessors. They call themselves Christians, and take their stand upon the canonical writings as they have come down to us; they approach these writings not as blind and abject slaves, but as intelligent and reasoning men. They claim the Protestant right of individual judgment upon these writings, and the teachings, dogmatic and moral, supposed to be contained in them. They deny the right of any Church, or any men, at any period of the world, to interpret these records in an infallible manner, binding on all future ages. Neither the Apostles, therefore, nor the fathers, nor the Church of Rome, nor Luther, nor Calvin, nor Wesley, nor Campbell have any right to promulgate a creed, and say this is the only true faith. They have a right to their opinions, and those opinions are authoritative so far as they commend themselves to our individual reason and judgment, but no further or otherwise. Each generation is as capable—nay more capable as the human race progresses in intelligence—of judging for itself as any of those which went before. It is, in their estimation, “a base abandonment of reason to resign our right of thought” on this subject to any men, or set of men whatsoever. With these views, and in this frame of mind, the modern rationalist approaches the dogmas of particular churches, and the documents from which those dogmas are professedly derived. Strauss’ *Leben Jesu* in Germany, and Renan’s *Vie de Jesus* in France, are the extremest developments of this line of thought. The author of the former, and by far the abler and more iconoclastic work, was, at the time of its first publication, and has perhaps continued to be the minister of a Christian congregation, while the loving appreciation of the author of the second for the subject of his theme is one of the principal charms of his popular volume. In England, Newman’s *Phases of Faith*, and Gregg’s *Creed of Christendom* were pioneers in the same direction.

The essays and reviews combated, it was supposed, although in a reverend spirit, some of the teachings of the Church of England on the subjects of original sin, infant baptism, the atonement, the inspiration of the canonical books of the Old and New Testaments, justification by faith, and the eternity of future punishment. The clergy were greatly excited by these shots from their own ranks, and the proceedings in question were instituted. At the hearing before Dr. Lushington, the venerable Judge of the Court of Arches, some of the charges were abandoned, and others were held not to be sufficiently made out; but the learned Judge was of opinion that the inspiration of the Scriptures, and the doctrine of eternal punishment,

were distinctly formulated by the canons of the English Church, and that the defendants were guilty of a violation of their pledges of ordination by teaching otherwise. Upon appeal to the Queen in Privy Council, the decision was reversed. The Judicial Committee of the Privy Council was in this case composed of the Lord Chancellor, an ex-Chancellor, two Common Law Lord Justices, the Archbishops of Canterbury and York, and the Bishop of London. The four Law Lords and the Bishop of London concurred in the entire judgment; the Archbishops only partially. The Lord Chancellor delivered the opinion of the Court, which was to the effect that the articles and formularies, or canons and rubrics of the Church of England, do not authoritatively declare the plenary inspiration of all and every part of the canonical writings, nor the eternity of punishment. The Court does not pretend to pass upon the merits of these dogmas, nor has it any power to declare articles of faith—that belongs to the “omnipotent” British Parliament; all it undertakes to do is to say that the Church as established leaves to its clergy and laity liberty of opinion on these points.

The wisdom of the organization of the Church of England was never more clearly demonstrated. If the court of final resort in ecclesiastical matters had been composed of clergy alone, there can be no doubt that the decision would have been different, and the circle of the religious influence of the Church proportionally narrowed. The doctrine of the fathers is still that of every Church as construed by its clergy, that a dogma is rendered the more certain in proportion to its folly and its impossibility—“*prorsus credibile est, quia ineptum est; certum est quia impossibile.*” Three thousand of the English clergy joined in a written protest against the decision, and it was virtually overruled at a general convocation. Legally, the action of the clergy and the convocation have no effect, but, practically, they will weigh much; for those who pride themselves on their orthodoxy will exercise the patronage of the Church for the benefit only of the equally orthodox. Temporarily, the legal decision may be nullified by orthodox bigotry, but its benefits will be felt hereafter, when intelligent faith becomes more the rule and less the exception.

In this connection the case of Dr. Colenso, Bishop of Natal, in South Africa, may be noticed. The reverend Bishop, in preparing a translation of the Old Testament for the use of his African parishioners, was suddenly struck, so says he, with the exaggerations, contradictions, and absurdities of the early Jewish annals, and the impossibility of explaining them satisfactorily even to the intellect of a Hot-

tentot. He was thereupon, he adds, led to study the subject more carefully with the best aids of modern exegesis, the result of which was to satisfy him that the Pentateuch was not written by Moses, was the production of a far more recent period, and was full of anachronisms, gross exaggerations, old wives' stories, and mythical or willful perversions of the truth. The consequence of this conclusion was, of course, a conviction that the commonly received doctrine in relation to the inspiration of Scriptures was erroneous. With the zeal of a convert, and with not a little of the blundering ignorance of such zealots, he set to work to bring the world to his way of thinking, and has already published several volumes of commentaries, the only merit of which consists in the extracts from the works of learned Germans, his predecessors in the same field. The clergy of South Africa were greatly scandalized, as may well be imagined, at the eccentric course of their learned Bishop, and undertook to subject him to ministerial discipline. They met in convocation and summoned him to answer charges of heresy, based on his recent publications. The Bishop refused to recognize the jurisdiction of such a self-appointed tribunal. The convocation proceeded to act, nevertheless, and, after going through the forms of a trial, unanimously convicted the Bishop of heresy, and suspended him from the exercise of his functions. The Bishop has taken an appeal to the Judicial Committee of the Privy Council, where, there seems little doubt, the proceedings will be set aside upon the ground of a want of jurisdiction in the Cape Town convocation. (And this was afterwards the result.)

On a par with cases originating in the fanaticism of orthodoxy, are those arising from the credulity and superstition of human nature. A recent trial in one of the western counties of England will serve as an illustration. An old deaf-mute Frenchman, who had lived in the county for several years, acquired the reputation among his neighbors of possessing supernatural power, to which he had himself doubtless contributed by his conduct with a view to gain. He applied to one of his female neighbors for money, which she refused to give. He went away much dissatisfied and with threatening gestures. Shortly afterwards the woman fell ill of some disease which defied medical skill, and which she and her friends attributed to the vengeance and unholy arts of the Frenchman. In this belief, she applied to him to relieve her, promising to give him more money than he had asked for if he would only unbewitch her. The Frenchman refused her offer in a manner which implied, as those present afterwards testified in court, that he could cure her but would not. Thereupon she and

some of her male friends undertook to bring him to reason by ducking him in a neighboring creek, and from the effects of the violence used the Frenchman died in a day or two afterwards. The parties who participated in the ducking were indicted for manslaughter and convicted. From the testimony introduced on the trial; there seemed to be no reason to doubt the sincerity of the belief of the woman and her neighbors that she had been bewitched by the deceased, and that he could cure her if he would. Their object was not to injure him, but to frighten him into doing what they believed he had the power to do, to remove the spell which he himself had cast upon her.

A similar case is chronicled in the French papers as having recently happened in upper Savoy. The supposed sorcerer in this instance was a woman, and the murderer a man, who imagined that she had bewitched his wife and daughter. The French jury acquitted him, although the murder was admitted, upon the ground that it would be wrong to punish an individual for acting on the belief of a whole neighborhood, the evidence showing in this, as in the English case, that the belief in the supernatural power of the supposed sorceress was general in the particular community. Well, says that shrewdest of modern vagabonds, Casanova, or his shrewder biographer: "*Jamais il n'y a eu dans le monde de veritables sorciers ou magiciens ; mais ceux qui ont pent se faire passer pour tels, ont toujours eu un pouvoir surnaturel.*"

Within the last few days, there was guillotined in the south of France, a man known as "*le petit Sorcier,*" the little Sorcerer. He, too, had been living for years on the credulity of the inhabitants of a rural Canton, until, not satisfied with the modest gains of his art, he undertook to get possession of the savings of an aged couple in his neighborhood by murdering them while going through some of the mummery of his profession. He had already drawn largely on the purse of these credulous subjects, and all that he gained by the double murder was the pitiful sum of about \$150. The jury who tried him, for a wonder, could find no extenuating circumstances, and he suffered the extreme penalty of the law.

The French police reports are full of instances of roguery growing out of the credulity of the lower classes of French peasantry. Nearly every neighborhood has its sorcerer or witch, to whom the neighbors apply for the cure of diseases, the discovery of stolen goods, the prevention of witchcraft, and the like. A melancholy catastrophe has recently occurred, growing out of the charlatanry of one of these characters, and the astonishing ignorance and superstition of the

family of the applicant. A father went with his daughter to the wizard to obtain his aid in relieving her from some disease which baffled the family physician. The wizard, among other tricks of his vocation, drew blood from one of the fingers of the patient, and with it wrote certain words on what he said was a consecrated wafer, and made the patient swallow the latter. The mother of the patient, a devout Catholic, upon being informed of the fact, was so frightened at the idea of the sacrilege committed in the use of a consecrated wafer, that she became insane. The alarm of the mother reacted on the daughter, and she too became insane. And, strange to say, another daughter, seventeen years of age, became similarly affected.

The French papers, even while I am writing these notes, are filled with the details of another even more deplorable instance of superstition in relation to the host, and growing out of the doctrine of transubstantiation. A little girl, twelve years of age, was about to take her first communion with several other girls of the same age. The sacramental wafer is required by the Church to be taken on an empty stomach. The girls met at the house of the parents of one of them early in the morning, and while waiting the appointed hour the little girl in question inadvertently ate a couple of strawberries. When they reached the Church, she abstained from taking the sacrament, and upon being interrogated by the Priest, she explained to him the reason, which he received very kindly, telling her to come again the next day. Upon returning home in the evening and mentioning the fact, her mother became much excited, and spoke of her indiscretion in such terms as to seriously alarm the poor child, so much so as to terrify the mother. With great difficulty, she succeeded, as she supposed, in quieting her daughter's nerves, and put her to bed. The child, however, got up in the night, and fled to a neighbor, who, instead of sending her home, sent her to the school to which she had been going. The mother, finding in the morning her daughter gone, was seized with the idea that she had drowned herself in the neighboring stream, and rushing to the water, plunged in and was herself drowned. A brother-in-law of the mother, who was much attached to her, became deranged on hearing of her death. He armed himself with a gun, and threatened his wife with it, charging her with concealing his sister-in-law. A neighbor who interfered to protect the wife, was turned upon by the madman and shot dead. The effect of these tragical events upon the innocent cause, the poor little girl, was, it is said, likely to prove fatal to her mental or bodily health. What dire results to follow the eating of two strawberries.

Another English criminal case of recent occurrence has created a great stir, and has developed a moral obtuseness and want of feeling on the part of the English middle classes, which was both extraordinary and unexpected. A man was put on trial for cruelty to a lunatic brother. The prisoner was a well-to-do tradesman at Falmouth, and his brother was possessed of some property. The proof was that the prisoner had for twenty years, kept his brother confined in a closet at the rear of his house, only six feet long by four or five wide, without any other opening than the door, which was locked, without fire, and without any clothing or bed covering. Here, in this den, wallowing in his own filth, and naked like a wild beast, had been confined from manhood to old age, one whom his contemporaries remembered as a handsome and harmless young man. The fact of his condition and mode of treatment was well known to the neighbors, and seems to have shocked no one, although the howls in mid-winter of the freezing wretch were often borne to their ears in the still night. Neither the city police nor the ecclesiastical functionaries had thought the subject worth attention. It remained for a stranger, a kind-hearted physician, who happened to settle in the vicinity, to bring the matter before the public, and rescue the victim from his horrible sty. The result, strange to say, was to bring to light several other cases in England of nearly similar treatment of idiots and lunatics by their nearest relations. The disclosures have been anything but creditable to the class in question.

By way of contrast, Punch himself has made merry over another recent English law suit, the facts of which are as marvelous as those of any fiction. An old man, who had amassed a handsome estate as a surveyor and land agent, died leaving a will by which the bulk of his property was devised to his brother, who lived in a different part of England. The Testator was a bachelor, who had living with him at the time of his death a female housekeeper, and a man named Elsey, with his wife, the latter being a sister of the housekeeper. Elsey had been employed by the Testator as an assistant and clerk for several years, and he was also the general manager of the Testator's affairs towards the close of his life. The will contained a bequest to the housekeeper, and another to Elsey. The will was proved, the Testator's brother took possession of the property, Elsey and family being permitted to remain in the house where the Testator died until the end of the year. A few weeks after the probate of the will, the Testator's brother also died, leaving several infant children as his heirs. Not long after this event, Elsey called upon the executor of

the Testator's will, an attorney of the neighboring town, and requested permission to hunt among the papers of the deceased for a surveyor's book, from which he wished to take some memoranda. While handling these papers, there was found, it was left doubtful whether by Elsey or the attorney's son who was aiding him in his search, a package marked "my true will." Upon opening this package, it was found to contain a copy of the Testator's will, purporting to be in his handwriting, in all respects like the one proved, except that it contained an interlineation by which the amount given to the housekeeper was increased by £50, and the bequest to Elsey somewhat enlarged, and except, also, that there was added a codicil by which a certain estate given in the body of the will to the Testator's brother was devised to Elsey, and another codicil giving to the attorney's son a money bequest as a mark of the Testator's respect for the father. The executor, whose suspicions of the genuineness of the paper, if he had any, were lulled by the last codicil, accepted the document for what it purported to be, and, as it bore a date subsequent to that of the first copy, proceeded to have it proved as the genuine will. No objections seem to have been made, nor suspicions aroused, and the will, with the modifications, would have soon disposed of the estate. Before, however, the necessary forms could be gone through with, a carpenter was employed by Elsey or the executor to make some repairs in a closet back of the Testator's bedroom, into which it opened. Below the window-frame in this closet, a small vice was fastened, and in attempting to remove it, a plank came off, disclosing an opening in which was a broken jar containing some pieces of money in it, and a package of papers. Among the latter, which were handed over to the executor, was found another codicil, attested by two witnesses, giving an additional portion of the Testator's property to Elsey. Singularly enough, too, this portion of the estate thus given contained a stone quarry on which one of the attesting witnesses of the codicil had a lease. This new document purported to be dated subsequently to the documents previously found, but not containing any provision for the executor or his son it was not received quite so readily as its immediate predecessor. It was thought best, upon legal advice, to leave Elsey to his legal rights in the premises, if he had any. Elsey, thereupon, filed his bill in Chancery to compel the executor to prove the codicil, and an issue was made up and sent to a Court of Law to try the question of the genuineness of both the instruments found as aforesaid. A first trial resulted in favor of their validity, but a new trial

was granted, to be tried by the Lord Chief Justice of the King's Bench, and a special jury. On this occasion the highest legal talent had been retained, and every resource of professional skill was applied to develop the truth. One of the attesting witnesses to the codicil last found had died since the first trial, and could not be subjected to the rigid cross-examination now resorted to. The other witness proved the genuineness of his signature, but failed to explain satisfactorily why he had been silent in regard to the execution of such an instrument until after it had been found. It was brought out in evidence that the Testator wrote two distinct handwritings, one a formal business hand, the other a running hand. It was also proved that, although a successful business man of good natural parts, he frequently misspelled words. The instruments sought to be set up as testamentary were in the running, not the formal business hand, and contained some words erroneously spelled which were always correctly spelled in the Testator's acknowledged business papers. The handwriting was also subjected to a critical examination by experts, and with a microscope, and the weight of the testimony in this respect was adverse to the genuineness of the documents. After a patient trial of several days duration, the jury returned a verdict that the papers offered were not the acts of the Testator, a conclusion in accordance with the summing up of the Lord Chief Justice. The counsel, who had argued for this view, had dwelt with great force, and much humor, upon the peculiarities of the instruments, and the extraordinary circumstances attending their discovery. He suggested that if the last codicil had been received as readily as the first copy of the will, there would have been, in due time, a new discovery in some out of the way place of still another testament, giving the residue of the estate to the lucky Elsey. "Yes, gentlemen," said he, "one can imagine our friend A., (the witness to the codicil who held a lease on the stone quarry), working in his quarry, and finding, after a successful blast, a venerable toad seated in a cavity of the rock thus exposed, and under that toad a parchment—and that parchment, what can it be except a codicil?" This hit was received with great laughter. Singularly enough, a few weeks after the trial, the local papers did chronicle the discovery of a new codicil under circumstances almost as marvellous as the toad hypothesis. At the sale of the personal effects of the Testator, a brother-in-law of Elsey had become the purchaser of the Testator's bedstead, and, in taking the bedstead down, the new will was said to have been found thrust between the bed curtains and the posts or slats to which they were

fastened. This will was in the formal business hand of the Testator (doubtless with the right words misspelled), and confirmed the gifts to Elsey contained in the previous instruments. On the announcement of this discovery, Punch took the matter in hand, and published a rapid succession of telegrams from his own correspondent, sent to the vicinity for the express purpose regardless of expense, announcing the finding of a new codicil every few minutes, each stronger in its language, and more conclusive in favor of Elsey and its own genuineness than any of its predecessors. This stroke of ridicule seems to have finished the business, for, when, a few days afterwards, the cause came on to be heard in the Court of Chancery upon the finding of the jury, Elsey's counsel permitted his bill to be dismissed with costs, making no effort to obtain a new trial, and no allusion to the new discovery.

But the codicil case *par excellence*, is now pending in the Courts of Paris. It involves the validity of seventy-nine codicils to the will of an aged member of the Portuguese Diplomatic Corps, at the French Court. The codicils are of every variety, and furnish a curious view of the psychological and social life of the Testator. The question involved in the case, is the sanity of the Testator, the substance of the codicils themselves being largely relied on to demonstrate the want of a sound disposing intellect. That the point is one of difficulty, notwithstanding the absurd character of many of these testamentary provisions, is evidenced by the fact that the judgment of the Inferior Court was in favor of the Testator's sanity.

And this case reminds me of another recently decided in France, a criminal prosecution, in which twenty-one hundred and sixty-nine (2,169) issues were submitted to the jury, and a verdict of guilty found upon all of them. The trial was of a man by the name of Vast, who had been employed since the year 1834, as a sub-clerk, or assistant, by the chief clerk of the Criminal Court of Paris. His duty was to receive deposits to cover costs made by parties who intervened in criminal cases for the enforcement of their civil rights against the accused, or to meet the costs of an appeal. The law required him, as soon as the litigation was terminated, to notify the depositors of the balance, if any, of the deposit remaining to their credit, and to pay over the same upon application. If the party entitled failed to apply in a certain time, the law required him to pay the money into the public treasury. The accused, it appeared, had, from the commencement of his functions, appropriated these balances to his own use, in most instances, forging the names of the

parties entitled to the receipts. He never notified the depositors at all as required by law, and if they applied of their own accord, he would put them off on some pretext or other. The fact that he was able to carry on this system of peculation for so many years, and to grow rich upon the spoils, shows that even in centralized and administrative ridden France, official roguery is as feasible as in some freer countries of our acquaintance. The statutes of limitations protected the defendant for acts committed more than ten years before arrest, but the separate acts of misappropriation of funds, and forgeries of signatures, within the ten years, amounted to the number included in the indictment, all of which were set out with the punctilious accuracy and fullness of a civil law *proces verbal*, or a Congressional report of kuklux outrages. Fancy one of our District Attorneys drawing up an indictment of two thousand one hundred and sixty-nine counts, and a thousand or so pages of legal cap!

The aristocratic and fashionable circles in England have been greatly exercised over the now famous case of *Yelverton v. Longworth*, the latter claiming to be Yelverton, and since persisting in the use of the name, notwithstanding the adverse decision of the House of Lords. Here too, the facts are more marvelous than those of the sensation romance, and throw Wilkie Collins' imagination on the same theme, completely into the shade. Yelverton, a younger brother of a noble peer of England, and a Major in the British army, had, a year or two before the Crimean war, and while crossing the channel, accidentally met Miss Longworth, who was traveling alone, and some courtesy on his part, led to conversation, which was kept up until they reached London. The young lady, it seems, was of respectable family, and with a fortune sufficient to support her, and to enable her to indulge a taste for traveling. She was in the habit of taking trips by herself on the Continent, and was what may be called a self-reliant and strong minded woman. The Major seems to have made an impression on her, for she attempted to renew the acquaintance by requesting him, by letter, to forward a communication from her to her brother, the brother, having, in fact, no real existence. Eventually, a correspondence commenced between the parties, and was kept up for several years, the letters on both sides being very well written. The object of the lady was, doubtless, to lure the Major into the net matrimonial, if she could, and the Major's cue was to avoid this finale, while going any length short of this, the lady might choose. In other words, the Major, relying on his aristocratic connections and rank in the army, looked forward to

a marriage with wealth or rank, or both, but, in the meantime, he had no objections to a flirtation, in the most extended sense, with a smart and handsome woman. His letters, while they abound in the usual professions of a lover, do not pretend to conceal his objections to the result aimed at by his correspondent. She followed him to the Crimea, where, as he alleges, some improper liberties were permitted him. Afterwards, the correspondence by letter was resumed, more tender on the lady's part, equally shy on his, so far as the main point was concerned. His regiment being, subsequently, stationed at Edinburgh, she followed him there, and personal intercourse was renewed. And here, singularly enough, the stories of the two parties differ, each insisting upon a version unfavorable to the end sought to be established by that party. The Scotch law recognizes marriage by simple agreement of the parties, or by a promise of future marriage followed by consummation of marital rights. The Major says there was consummation without promise or agreement. The lady says there was express promise without consummation until after the secret marriage which subsequently took place in Ireland. If the Major had conceded the truth of the lady's statement, that there was no consummation, half the battle would have been won. If, on the other hand, the lady had conceded the truth of the Major's version, half the contest was gained. So it was, they differed in their stories. The Major having been transferred to Ireland, she followed him, and in a remote parish in that island, whither they traveled as man and wife, the marriage ceremony was performed by a Catholic Priest, without any registry of the marriage having been made by him in the book kept for the purpose of registering marriages. The Major's story is, that both parties were aware that a marriage by a Catholic Priest, of a Protestant and a Catholic, (the Major claiming to be of the former, and the lady of the latter faith,) was a nullity, but he was willing to go through the forms as a salve to the lady's conscience, she having already conceded to him the rights of a husband. The lady's story is, that the Major was willing to make her his lawful wife, and only insisted upon its being kept secret for family reasons. However the truth may be, the lady and gentleman subsequently traveled about in England and on the Continent as man and wife, separating from time to time, and continuing to correspond as before. In this state of affairs, the lady fancying herself, or pretending to be in the condition of wives who love their lords, began, in her letters, to speak rather pointedly of her matrimonial rights, and of the necessity of making them public, his answers to which letters are not produced

by her. In the meantime, the grand catastrophe was reached by the Major marrying a Mrs. Forbes, a rich widow. Some months elapsed without any effort on Miss Longworth's part, to substantiate her claims to the fickle swain. The first time the point was made, was in a suit brought in Ireland by a creditor of Miss Longworth against the Major for goods furnished her as his wife. The validity of the Irish marriage was insisted on by the creditor, and the point was sustained, so far as it could be in that mode, by a verdict of the jury in favor of the plaintiff for the full amount of his claim. Afterwards, the Major and his bride went to Scotland, and were followed by Miss Longworth, who openly assumed the name of Yelverton, and claimed to be the real wife. Thereupon, the Major commenced an action in the Scotch Courts, allowed by the civil law, to prohibit her from using his name, and she, nothing daunted, insisted in answer upon both the Scotch and Irish marriages, and commenced a cross-action to establish their validity. The Judge Ordinary decided that the marriage was not made out, but, upon appeal, a majority of the Scotch Judges, two out of three, held that a marriage *per verba de futuro*, with copulation had been sufficiently shown. The House of Lords, upon a second appeal, by a vote of three judges to two, reversed the decision of the Scotch Appellate Court, and declared the Scotch marriage not proven, and the Irish marriage invalid. Four out of the nine judges who passed upon the case, it will be noticed, decided in favor of the lady. She seems, therefore, fairly entitled to the doubt upon which he has since acted, and which has been gallantly conceded to her by the American Republicans, since she came to this country. Or is this another sign of our moral demoralization, so significative of the ways of the hour?

A suit on the Continent, recently brought to a close, is more remarkable for the length of litigation than even for the subject matter of the litigation. It may be traced back to the affair of the famous diamond necklace, in which the reputation of Marie Antoinette was involved, and for which the last of the Valois suffered such ignominious punishment. The suit was brought by the jewellers who sold the necklace against the heiress of the Prince Cardinal Rohan. It may be remembered by those familiar with the history of this remarkable affair, that the Cardinal assumed the payment of the price of the necklace to the jewelers. Before the debt could be realized, the revolution of 1789 began, the Cardinal became an exile, and his estates were confiscated. He died, it seems, in the year 1804, and his heiress, the Princess Charlotte, accepted the estate, with the benefit

of inventory, by which, under the civil and French law, her liability for debts was limited to the value of the property received. The suit recently decided was based on a charge of mismanagement, and fraudulent concealment of assets. The court held that these charges were not sufficiently made out, and dismissed the action, without prejudice to the plaintiffs' rights against the property in the inventory.

It is curious to see a cause of litigation dating so far back in these days of swift justice—that is, swift in comparison with the past. Up to a recent period in England such cases were not at all uncommon, and even now they crop out of the musty records of the courts both in the British Isles and on the Continent. Within a few months past the courts of France disposed of a claim which originated in Pondicherry, in the East Indies, when that portion of the Indian Empire was a French dependence. Far more ancient, and more marvellous, is a case said to have been recently disposed of by the Spanish courts, which had been pending two hundred and forty years, and which involved the title to the property of three Pizarros, one of them the brother of the conqueror of Peru.

Here is a French case, just decided, the facts of which would have been deemed extravagant in one of Dumas' romances. About the year 1830 a Frenchman died, leaving a widow and several children. About nine months after his death the widow gave birth to a daughter. The child was born within the time fixed by the French law to establish posthumous legitimacy, but the mother, for some reason fearing the slanderous gossip of neighbors, concealed her pregnancy, and caused the new-born infant to be deposited in a foundling asylum. In less than a month she repented her action, made known the facts to the authorities of the asylum, and identified her child by certain articles of clothing, which were admitted to have been received with it. The child had been put out to nurse at a neighboring village, where the mother went to visit it, and furnished money for its support. In a year or two afterwards she formally claimed the child, repaid the asylum all expenses, and had the proper corrections made in the registry of births, so that there might be no doubt of the child's legitimacy. Thus restored to her rights, the child grew up in the family to womanhood, and was married and endowed as one of the lawful children. Recently another young woman, who had grown up under the fostering charge of the same foundling asylum, came forward, insisting that a mistake had been committed in the infant reclaimed, and that she was the real child. Upon the refusal of the widow to recognize her she instituted legal proceedings to estab-

lish her legitimacy under the French law, and, strange to say, conclusively demonstrated her right. The key to the mystery lay in the fact that there were two nurses of the same name entrusted by the asylum with the custody of foundlings in the village to which the widow had been referred, and she had accidentally gone to the wrong nurse. A curious part of the story is that the mother, notwithstanding the legal decision, refuses to recognize her daughter, and insists that she can not transfer her affections from the cherished object of so many years to a stranger at the dictation of a court.

The ex-Duke of Brunswick, who has made Paris his home for many years, has been a party to several suits of late, celebrated more because of his connection with them than for any great peculiarity of facts. One of these suits was brought against the Duke by his daughter, the offspring of a morganatic union with an actress, and her husband, to compel him to contribute to their support under the French law, which requires parents to support their children, and children their parents under certain circumstances. The noble ex-sovereign resisted the claim by a plea that he was not a Frenchman, and therefore not subject to the law in question. The Court of Cassation held, however, that the law applied to all persons domiciled in France as well as to citizens. The cause is still pending on the merits. The ex-Duke's hobby is a love of diamonds, and his collection of these precious stones is of immense value, and famous all over Europe. About a year ago he was robbed of them to the value of several million francs by a confidential servant, but the thief was caught on the French frontiers and the property returned. The papers commented on His Excellency's mania upon the occasion, and one of them so freely that the Duke felt it necessary to salve his dignity by a suit for a libel. The courts could not see things in the same light, and dismissed his action.

I have already, in an early number of this series, mentioned the case of the Count de la Pommerais, who was guillotined for the murder of his mistress, in order to realize the insurance which he had secured upon his life, to wit, five hundred thousand francs. A suit was instituted upon these policies by the children of the murdered woman, which was pending when I left Europe.

As an offset to the eccentricities of these members of the continental aristocracy may be mentioned the eccentricity of Byron Oscar Noel, titular Lord Wentworth, and grandson of Lord Byron. This heir of his ancestor's passions, but not of his genius, quarrelled with his family, and, renouncing his title and station, became a com-

mon laborer in the dock-yards of London. He is said to have married a woman in the lowest ranks of the populace, and to have lived and died in this voluntary exile. About the time of the announcement of his death the newspapers called the public attention to the demise in one of the western sea-ports of England of the last scion of a noble family as a common drunkard. Romance itself has not dared to trace the vicissitudes of aristocratic families with all the colors of truth. The English government, with a liberality which was creditable to the throne, the government, and the judiciary, did actually, during my stay in Europe, permit the institution of legal proceedings against the Queen by a claimant of the Duchy of Lancaster. The claim was so obviously without legal foundation that a refusal would have been generally, if not universally, acquiesced in as proper. But, upon a petition of right, the usual permission was given, let right be done, and it was done. This was in noble contrast to the course of the imperial government in France, which refused to allow the claim of the citizen-King, Louis Phillipe, to his private property, after the revolution of 1848, although sustained by the courts. They may do some things better in France, but England stands pre-eminent in the protection of individual rights.

W. F. COOPER.

Nashville, Tenn.

NOTE.—I find that in copying my manuscript I have, in a former number, page 206, inadvertently used the name of Coleridge instead of Cowper, in speaking of the English barrister who rose to the bench after having been tried for his life. With this correction, these scattering notes will conclude.

W. F. C.

THE LIABILITY OF CARRIERS.

The question how far the common carrier may limit or restrict his common law liability by contract or notice, although it has often been before the courts of the country within the last quarter of a century, seems as far from a satisfactory solution as ever. It is one with which but few of the legal profession have not had to deal in some shape, and yet, strange to say, it has never been brought directly before the Supreme Court of our State in any reported case; and in the absence of all legislation, we are left to arrive at our conclusions upon the subject as best we can by a resort to the conflicting cases and to that great fountain—the common law.

When we begin our investigation, however, it turns out that the very difficulty in the question is, as we shall hereafter see, in determining how far the ordinary rules of that law as to the obligation of contracts and the effect of notice in restricting liability, are applicable to the case of the common carrier.

Three different opinions have been held by the common law courts on the subject.

First, it has been held by some of them that, by the common law, the carrier had the same right as other bailees to contract either expressly or by implication, from private or even public notice brought home to the knowledge of his bailor, for a restricted liability.

Secondly, it has been held by others that no such right ever existed but that common carriers by their very vocation, being engaged in a public employment and owing duties in that character to the public, were on grounds of public policy, entirely powerless to modify or limit their common law liability, either by express contract or by notice.

And thirdly, it has been held that neither of these opinions is correct, but that the true ground lies between the two, and that the carrier, while he may restrict his liability by special contract with his bailor, can not do so at least by public or general notice, though brought to his knowledge, leaving, however, the question as to what will constitute such special contract undetermined by any general rule.

In this judicial conflict, while we cannot hope to unravel the

tangled skein, it may not be unprofitable to examine somewhat carefully into the history of the cases and ascertain, if we can, with whom the advantage lies.

It would, of course, be a matter of prime importance to determine what the law was upon this question in England previous to the American revolution, a date frequently referred to in its discussion in this country; but it is a fact somewhat remarkable that previous to that time, no case had come before any of the English courts, in which it was involved. The idea of divesting himself of his extremely onerous common law liability by notice or contract seems never to have been put in practice by the carrier until about that time.

The reason for this is well explained in the English note to the case of *Coggs vs. Bernard*, 1 Smith's Leading Cases, 365. "However," says the author, after referring to this circumstance, "when the increase of personal property throughout the kingdom and the frequency with which articles of great value and small bulk were transmitted from one place to another, had begun to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it by entering into contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end they posted up and distributed written or printed notices to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it."

Although, however, no case had brought the question directly before the courts up to that time, the right of the carrier to make special acceptances and contracts to avoid his heavy responsibility, had been taken for granted and assumed as law by Lord Coke, in the note to Southcote's case, 4 Rep., 84, and by Rolle, J., in *Kenrigg vs. Eggleston*, Aleyn, 93, as early as 1649; and afterwards in the case of *Morse vs. Slue*, 1 Ventr., 238, it was observed by Lord Hale that the master of the ship "might have made a caution for himself;" but having failed to do so, he was held liable, although it had been found by the jury that he was not to blame.

It was, no doubt, from these early declarations of the law, that the common carrier took the hint of resorting to notices and contracts for relief when the change in the nature and circumstances of his business seemed imperatively to require it. The case of *Kenrigg*

vs. *Eggleston*, it may be here observed, is also noticeable as showing the great rigor with which carriers were treated in that age. It was the case of a box delivered to the carrier with the statement that it contained a book and some tobacco, when, in fact, it also contained a large amount of money. He was held liable, notwithstanding the fraud; Rolle, J. telling the jury that as he had not made a special acceptance he was liable also for the money; *quod durum videbatur circumstantibus*, as the reporter adds; which afterwards in *Gibbon vs. Paynton*, 4 Burr., 2301, elicited from Lord Mansfield the remark that he would have agreed with the *circumstantibus*.

It is somewhat strange that from all we can gather from the old reports the right to make this "caution for himself" by the carrier, if any such right existed, was permitted to lie dormant and does not figure nor is even made the subject of remark in any of the cases for nearly a whole century; for the next we hear of it, is in *Gibbon vs. Paynton*, 4 Burr. 2290, (A. D., 1769,) in which the attempt was made to hold the carrier liable for money delivered to him, concealed in a bag, filled with hay, although the carrier had given notice that he would not be liable for money or valuables unless notice was given. Mansfield, C. J., decided the case on the ground of fraud; but the other Judges considered the notice as equivalent to a special acceptance. And it seems that the next heard of it, was in *Forward vs. Pittard*, 1 T. R., 27, before the same Court, in 1785, until which Burrough, J., says in *Smith vs. Horne*, 8 Taun., 50, the doctrine of notices by carriers was never known in Westminster Hall. The case, however, went off upon another point, and the question as to the validity of the notice was not adjudged.

It is to be observed that from these two cases it would appear that the first attempt made by carriers to evade their common law liability was by public notice, and that the resort to special contracts and acceptances was an afterthought. And it is also worthy of notice that the very first two cases in which notice was invoked as a defense by the carrier, were before Lord Mansfield, who, in neither of them, discountenanced it.

At length, in 1804, in the case of *Nicholson vs. Willan*, 5 East, 507, the question as to the validity of such notices came up directly for decision before Lord Ellenborough, in the King's Bench. The defendants, who were carriers, had put up an advertisement on a board in their office, of which plaintiff had notice, that they would not be liable for any package whatever above the value of £5, unless insured and paid for at the time of delivery, and unless, if lost, its

value should be demanded in one month after such damage was sustained. The parcel in question contained £58, of which no notice was given to defendant. After a *curia advisari vult*, Lord Ellenborough delivered his judgment, in which he said: "Considering the length of time during which and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this Kingdom under the observation, and with the allowance of courts of justice, and with the sanction and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases on the ground of such a measure being unnecessary, inasmuch as carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also that there is no case to be met with in the books in which the right of the carrier thus to limit his own responsibility by special contract, has ever been by express decision denied, we can not do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the legislature if it shall think fit to apply such remedy hereafter as the evil may require." And the judgment was accordingly that the plaintiff could not recover even the £5 which the jury had found for him.

This decision at once cleared away all doubt as to the validity of notices by common carriers to limit their responsibility when brought to the knowledge of the bailor, and from that time there are numerous cases to be found in the English Common Law Courts, recognizing the doctrine as fully established, several of the Judges going so far as to say that there was never any doubt: *Batson vs. Donoran*, 4 B. & Ald., 32; *Mayhew vs. Eames*, 3 B. & C., 601; *Maving vs. Todd*, 1 Starkie, 72; *Leeson vs. Holt*, *Id.*, 186; *Riley vs. Horw*, 5 Bing., 217.

Under the law, as held in these cases, the carrier might limit his liability for loss or injury resulting from any cause whatever, even the felony of his own servants, except his own gross negligence or misfeasance, either by express contract with the bailor, by special acceptance of the thing to be carried, or by public notice by advertisement or otherwise brought to his knowledge. *Butt vs. Great W. R. R.*, 11 Com. B., 140; *Brook vs. Pickwick*, 4 Bing., 218; *Smith vs. Horne*, 8 Taun., 18; *Birkett vs. Wilan*, 2 B. & A., 356; *Garnett vs. Wilan*, 5 *Id.*, 53; *Sleat vs. Fagg*, *Id.*, 542; *Wright vs. Snell*, *Id.*, 35; *Wyld vs. Pickford*, 8 M. & W., 443. The mode re-

sorted to however in the great majority of the cases, was that of public notice, which according to all the cases, if brought to the knowledge of the bailor, constituted what was called a special or qualified acceptance by the carrier and was the contract of the parties.

With this exception, however, as to the negligence of the carrier, engrafted upon the rule, it afforded a very precarious protection to him, for, as is said by Lord Denman, in *Hinton vs. Dibbin*, 2 Ad. & El. (N. S.) 646, "without negligence of some kind, it is not very easy to suppose how a loss for which the carrier is liable can take place."

It was, too, in many instances, impossible for him to prove positive knowledge of the notice by his employer; and many questions arose as to what should be sufficient evidence that the notice had come to his knowledge, whether it was to be presumed that he had seen it in a newspaper which he had been accustomed to read, or whether he had seen it posted up at the office where the carrier transacted his business. Questions also arose as to the construction to be put upon the various forms of notices which had been adopted. These and various similar questions were being brought before the Courts, so much to the discomfort of the Judges, it seems, that several of them expressed regrets that the door had ever been opened to them.

These considerations in connection with the frauds which were being practiced upon carriers by concealments of value, and the frequent hardships resulting to them from the carelessness of their servants (see *Hinton v. Dibbin*, *supra*), induced the Legislature to pass the act of 11 George, 4, and 1 W., 4, (1830) commonly known as the English Land Carrier's Act.

The title of this act is "for the more effectual protection of mail contractors and other common carriers for hire against loss or injury to parcels or packages delivered to them for conveyance or custody, the value or contents of which shall not be declared to them by the owners thereof." After a preamble which recites that by reason of the frequent practices of bankers and others sending by public conveyances for hire, parcels and packages containing articles of great value in small compass, much valuable property is rendered liable to depredation and the responsibility of such common carriers is greatly increased, and by the frequent omission of persons sending such parcels to notify the value and nature of the contents so as to enable such carriers to protect themselves against losses, "and the difficulty of fixing parties with knowledge of notices," published to

limit their responsibility they have sustained heavy losses, it is enacted that no such common carrier shall be liable for the loss of or injury to any property therein specified above the value of £10, (enumerating almost every conceivable article of value which can be compressed into a small compass), not occasioned by the felonious acts of his servants or his own personal negligence, unless at the time of the delivery thereof at the office of such carrier the value and nature of such property shall have been declared and the increased charges authorized by the act shall have been paid; and further, that from and after that time, no public notice or declaration shall exempt any carrier from his liability at common law for the loss or injury to any articles other than those specified, but that as to such other articles his liability as at common law shall remain, notwithstanding such notice; and provided, also, that no special contract with the carrier shall be affected by the act.

These are the substantial provisions of the act, which, to this day, remain the general law of Great Britain, as to the liability of carriers by land, except in so far as it has been modified by the Railway and Canal Traffic Act, of 1854, which only provides that, as to the things therein enumerated, no conditions as to their carriage by railway and canal companies, shall be valid unless the same be just and reasonable; and signed by the owner or person delivering the same, to be carried; provided, however, that nothing therein contained shall affect the rights, privileges and liabilities of such companies under the Carriers' Act, with respect to articles of the description mentioned therein.

Commenting upon their Carrier's Act, the English Judges have said that protection to carriers was the object, as its title imports, and that they would not put upon it a more limited construction than its language required. Hence they have held that, although public notices will no longer avail the carrier in limiting his liability, special contracts for that purpose are still allowed, and are not affected by the act. And that if notice be given to the customer, and he subsequently sends his goods to be carried without objection to the terms of the notice, he is bound thereby: *Walker vs. Y. & N. Midland R. R.*, 2 El. & B., 750; *Austin vs. Manchester, R. R.*, 10 C. B. 454; *Carr vs. Lancashire, &c. R. R.*, 7 Ex. 707; *Fovles vs. G. Western R. R., Id.*, 699. So that the validity and effect of notices other than such as are called public, remain the same as before the act.

It was also decided in *Hinton vs. Dibbin*, 2 Ad. & El., (N. S.),

646, that the carrier under the act is not liable for a loss of any of the articles therein enumerated, even though it may have been occasioned by the gross negligence of his servants, not amounting to felony, unless the nature and value of the goods was declared at the time of their delivery, and the increased charges paid; and in numerous cases it has been held that, under both acts the carrier may contract even against loss by his own negligence, or the negligence of his servants, though not against their felonious acts; thus reversing the rule as it before existed; provided, however, that as to cases coming within the Railway and Canal Traffic Act, the contract must be just and reasonable and signed by the party: *Carr vs. Railway Co.*, 7 Ex., 707; *Chippendale vs. Lancashire R. R.*, 7 Eng., L. & E., 395; *Austin vs. Manchester &c., R. R.*, 10 C. B., 454; *Hughes vs. G. Western R. R.*, 14 C. B., 637.

Nor is it material in what mode the contract is made. Neither writing nor signing, nor any other formality is required, the question in every case being one of fact—whether there was such contract. *Walker vs. Y. & N. Midland R. R.*, 2 El. & B., 750. And although a mere public notice may not be sufficient, if a ticket containing such notice be delivered to the consignor or his agent, it will suffice to limit the liability of the carrier, whether it was read over or explained, or understood by him or not: *G. Western R. R. vs. Morville*, 10 C. B., 366; *Palmer vs. Junction R. R.*, 4 M. & W., 749.

As to carriers by water, many acts have been passed in England narrowing their common law liability from the 26 Geo. 3, to 17 and 18 Vict., the nature of which is stated in the note to *Coggs vs. Bernard*, 1 Smith Ld. Cases, and which would seem to be equally as effectual for their protection. So that it would seem that the common law liability of carriers of every kind is now practically obliterated in Great Britain; or if ever incurred or imposed, it can only be through the fault or neglect of the carrier himself, in failing to provide against it. Indeed, in some respects, this legislation seems to have put him upon a safer footing than that of the ordinary bailee for hire. So little did Bronson, J., understand of the nature and effect of the Carriers' Act, as subsequently construed by the English Judges, when, after declaring, in his opinion, in *Hollester vs. Nowlen*, 19 Wend., 234, that it might well be questioned whether any system could well be devised which would operate more beneficially than that which imposed the liability of an insurer upon the carrier without any right to qualify it by contract or otherwise, goes on to say: "I feel the more confident in the remark from the fact that in

Great Britain, after the courts had been perplexed for thirty years, with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the Legislature finally interfered and in its more important features restored the salutary rule of the common law."

We have been thus particular in giving the outlines of the English judicial and legislative history of this question in order that we might see how judges of such learning in the principles of the common law have dealt with it as a common law question, independently of legislation, and how, both in practice and theory, it has been viewed by a people so eminently practical and sensible in all that concerns their commercial welfare. The statute upon which they have been content to rest the doctrine of the treatment of the carrier, has now been in existence for more than forty years, without any disposition, so far as we know, to alter it, and without any complaint of its injustice. We know of nothing which could be more persuasive than their judicial opinions of what the law is on strictly common law principles, in the absence of legislation, or which could be more instructive than the practical working of such laws to those whose province it may be to settle so vexed a question as to the manner and degree in which the carrier may provide for his safety.

We now turn our attention to this side of the Atlantic to find but little of that unanimity which we have seen prevailing amongst the English Judges.

In this country the contest between the carrier and his employer upon this question of the carrier's right to limit his extraordinary common law liability, commenced, so far as the cases show, in 1838, before the then Supreme Court of the State of New York, with the somewhat celebrated cases of *Hollister vs. Nowlen*, and *Cole vs. Goodwin*, reported in 19 Wendell, 234-282. Both turned upon the validity of public notices by stage-coach proprietors that all baggage should be at the risk of the owners. Although the amount involved in the cases was of but little value, they seem to have been of great interest to both Bench and Bar, for each of them was argued twice before the Court by eminent counsel. The difficulty with the Court was whether it should follow the English Courts, which, as we have seen, had long before decided in favor of such notices in numerous cases, or disregard such authority as post-revolutionary, and upon grounds of public policy, hold the other way. After great deliberation the distinguished Judges concluded that they could not agree

with their English brethren, and in very able and elaborate opinions they decided that by the common law carriers did not possess the right to limit their responsibility by public notice, though brought to the knowledge of their employers.

As the question did not arise in these cases as to the carrier's power to restrict his liability by express or special contract with his bailor, they expressly declined to decide whether this could be done, Bronson, J., saying that he would not deny but that it might be done. A few years afterwards, however, this very question came before the same court in *Gould vs. Hill*, 2 Hill's R., 623. In that case the carrier had given a receipt for the goods, in which it was stipulated that he would forward them "danger of fire, etc., excepted, and not holding ourselves responsible if lost, stolen or damaged, beyond the value of \$200." The goods were destroyed by fire on their passage, not occasioned by the negligence of the carrier. The court below instructed, and the jury found for the defendant. But the judgment was reversed, Nelson, C. J., dissenting, and Cowen, J., who delivered the opinion of the court, saying: "For myself I shall do little more than refer to my opinion in *Cole vs. Goodwin*, and the reasons for such opinion as stated in the course of that case. It was to the effect that I could no more regard a special acceptance as operating to take from the duty of the common carrier than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the Courts. The only difference lies in the different kind of evidence by which the contract is made out. When the jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor as if he had reduced it to writing. Indeed the contrary construction would be to tolerate a fraud on the part of the bailor. The true ground for repudiating the general notice is therefore its being against public policy; and this ground goes not only to the evidence—the mode in which you are to prove the assent—but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we can not consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same whether we allow one form or the other."

These cases, decided by a court of such high authority, composed as it was of Nelson, Bronson and Cowen, JJ., and being the first

upon these difficult questions, seemed to forestall the whole controversy against the carrier. Their spirit and doctrine seemed to chime with the unaccountable hostility which seems always to have prevailed in this country against the carrier in his contest to relieve himself of his dangerous risk. Their influence was immediately felt in all the cases between the carrier and his employer, and from the *dicta* of the courts they would have been implicitly followed by many of them even to the extent of the doctrine of *Gould vs. Hill*, had there been occasion to apply the law in cases raising the question: *Jones vs. Vorhies*, 10 Ohio, 145; *Fish vs. Chapman*, 2 Kelly, 349. But it so happened that no reported case in any of the courts of last resort came up upon the very point in *Gould vs. Hill* as to the right of the carrier to relieve himself by special contract, until the question was made before the Supreme Court of the United States at its January Term, 1848, in the leading case of the *New Jersey Steam Navigation Company vs. The Merchants' Bank*, 6 How., 344. The opinion in this case was delivered by Nelson, J.; who, in the mean time, had been put upon the United States Supreme Bench. He had dissented as we have seen in the case of *Gould vs. Hill*, and the same question coming again before him, he took occasion to expressly disapprove it, and sustained the right of the carrier to limit his liability by contract. The opinion of the Court was unanimous upon this point, as we are left to infer from the report of the case.

This authority seemed to settle the question to this extent in favor of the carrier, and to have completely overturned that of *Gould vs. Hill*, which is now remarkable as being the only case to be found in the books which decides against the right of the carrier to contract with his employer so as to limit his liability as an insurer. The very first courts after the *New Jersey Steam Navigation Company vs. The Merchants Bank*, to follow its authority, were those of the State of New York. And the doctrine of *Gould vs. Hill*, after having been pronounced in 1849, in *Wells vs. Steam Navigation Company*, 2 Com., 204, by Bronson, J., as still debatable, although he had concurred in the opinion in that case, was repudiated in *Pursons vs. Monteith*, 13 Barb., 353; *Moore vs. Evans*, 14 Id., 13; *Stoddard vs. Long Island Railroad*, 5 Sand., 180; *Dorr vs. New Jersey Steam Navigation Company*, 1 Kernan, 487.

Numerous cases in the other States have adopted the same view, and it may be now laid down as settled law in this country that carriers may restrict their common law liability by special agreement to that effect, with the qualification, however, that they can not in this

manner relieve themselves from the consequences of the negligence or misfeasance of themselves or their servants: *Kimbal vs. Rutland R. R.*, 26 Vt., 247; *Davidson vs. Graham*, 2 Ohio (N. S.), 131; *Mercantile M. I. Co. vs. Chase*, 1 E. D. Smith, 115; *Amer. Trans. Co. vs. Moore*, 5 Mich., 368; *Ill. Cen. R. R. vs. Morrison*, 19 Ill., 136; *W. Trans Co. vs. Newhall*, 19 Id., 466; *Ashmore vs. Penn. & Co.*, 4 Dutcher, 180; *Roberts vs. Riley*, 15, La. An., 103; *Camden & A. R. R. vs. Baldauf*, 16 Penn. S., 67; *Veiner vs. Sweitzer*, 32 Ib., 208; *York Co. vs. Central R. R.*, 3 Wall., 107; *Kallman vs. U. S. Ex. Co.*, 3 Kansas, 205; *Swindler vs. Hilliard*, 2 Rich., 286; *Boorman vs. Ex. Co.*, 21 Wis., 152.

But nearly all of these cases at the same time dispute their right to restrict their common law liability by what they call general or public notices, although known to the employer. It therefore becomes important to determine what constitutes the special agreement or contract required. No line can of course be drawn which will exactly separate notices so general as to be excluded from such as are so direct and personal as to be, when not objected to, tantamount to what is meant by a special contract. This of course leaves debatable ground in many cases, and may in the end perplex the courts as much as their wholesale admission did those of England.

According to all the English cases on the subject before the Carrier's Act, a contract sprung from the knowledge of the notice. The theory on which they all stand is that if a party, knowing the published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and employer. And as between parties who are not carriers and other persons who deal with them, there can be no question but that this is the law upon the most obvious principles. The American cases, however, upon special grounds, deny the application of this law to the common carrier while admitting that they may contract specially. But they do not explain wherein a special contract differs from a general one; nor is there in law any such division of contracts into general and special, of which we are aware, as will give us any definite idea of the difference between them; or any definition of the word "special" as applied to contracts. Still we know that in the law books, as well as in common parlance, the word is frequently used in that connection. But in strictly legal nomenclature it describes no species of contracts as distinguished from another, and without connection with the particular subject or occasion for its use, it means nothing because in law one contract is as special as another.

Nor will it do to say that special means express as distinguished from implied, and that the contract must be expressly assented or agreed to by the bailor. This would be simply drawing a very wide distinction between the obligation of an express and an implied contract, which does not exist either in law or in morals. And besides, in some of the very cases in which the efficacy of notice is denied, the carrier was relieved on the ground of contract, although both knowledge and assent were denied. For instance, in the leading case of the *York Company vs. Central R. R.*, 3 Wall., 107, the carrier was relieved from the liability for loss by fire because that was one of the excepted dangers in his bill of lading, although it was proven by the agent of the shippers that the cotton was put on board the steamer before the bill of lading was signed, that he did not examine it, and that his attention was not called to the fire clause. In this then, as well as in others of the above cited cases, there was no express assent to the terms on which the carrier received the goods, and yet it was held that there was an express or special contract which protected him.

We must, therefore, look to the occasion and the circumstances of its use in order to arrive at the meaning of those who use it to describe a contract.

In this view, we do not think there can be very great difficulty in fixing its meaning, when applied to the contracts of carriers. The same word is used in the English Carriers' Act, which, while it declares ineffectual all public notices by carriers to limit their liability, provides that nothing therein contained shall affect special contracts for that purpose.

Since the passage of this act, many cases have occurred and are reported which give us examples of what are considered special contracts with carriers by the English courts. It seems from them that the universal custom of land carriers since that act has been to deliver to the employer a ticket or printed notice, in which are stated the conditions upon which the carrying is to be done, and which, when received by him, constitutes the special contract. This, in their view, makes a contract in which the parties are named and the terms agreed upon between them, and that without resorting to anything like a public notice, which satisfies the requirements of the act and avoids the evils against which it was intended to provide. Indeed, it would be difficult to conceive how a contract could be made more special: *Palmer vs. Grand J. R. R.*, 4 M. & W., 749; *Carr vs. Railway Co.*, 7 Ex., 707; *Chippendale vs. Lancashire R. R.*, 7

Eng. L. & E., 395; *Morville vs. G. N. Railway Co.*, 10 Eng. L. & E., 366; *Austin vs. Manchester R. R.*, 10 C. B., 454. And it is not necessary that such ticket should be read over to the shipper, or his attention directed to its contents: *Y. N. & B. Railway Co. vs. Crisp*, 25 Eng. L. & E., 396; *Palmer vs. Grand J. R. R.*, 4 M. & W., 749.

As in England, the land carriage of this country is nearly engrossed by railways, canals, and express companies, and the usage as to the manner of contracting with their employers is believed to be in effect the same. When goods are delivered to them a receipt is usually given, in which are stated the terms as to the liability of the carrier on which they are to be carried, which are treated in all respects as to their legal effect as bills of lading: *Dows vs. Perrin*, 16 N. Y., R. 328; *Dows vs. Green*, 24 *Id.*, 630; and it was never doubted but that the bill of lading of the carrier by water was not only the receipt of the carrier but an express contract between him and the shipper as to every exception contained in it. And no reason is perceived why a different legal effect should be given to them because the one relates to carriage by water while the other relates to carriage by land, unless the former derives some advantage from the antiquity of its use.

Hence, most of the American cases above cited, while denying the right of the carrier to protect himself by public or general notices, have treated such receipts as creating contracts sufficiently special for that purpose, without inquiring whether they had been read or explained, or understood, or assented to, by the shipper or bailor, or not, provided the carrier has resorted to no unfair means of deception, and the employer has had the opportunity to know, if he had desired, the contents of such receipt. Nor is there anything unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the carrying business now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading and receipts are constantly given, not only as evidence of the receipt of his goods, but as express and direct notice to him that they will be carried on certain terms. Knowing this, he can not be willfully blind. He can not plead ignorance, when it was his duty to know; and knowing, in such cases, is assenting. If it was his intention to hold the carrier to his common law liability, he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk.

Accordingly, it has been held in many cases that such conditions

included in the receipt thus given are binding on the employer as special contracts between him and the carrier, which he is not allowed to dispute or avoid by showing that he did not expressly assent, or did not know its contents, or did not read it until after the loss had occurred. As, for instance, notices in such receipts that the carrier would be responsible only for a certain sum, unless the thing bailed for carriage should be valued and paid for accordingly, although it might be of greater value than the limited sum: *Kallman vs. Adams Ex. Co.*, 3 Kansas, 205; *Hopkins vs. Westcott*, 6 Blatchf. R., 64; *Brehme vs. Adams Ex. Co.*, 25 Md., 328; *Boorman vs. Ex. Co.*, 21 Wis., 152; or that he would not be responsible for accidents or losses from fire: *York Co. vs. Central Railroad*, 3 Wall., 107; *Farnham vs. Camden & A. R. R.*, 55 Penn. S., 53; *Swindler vs. Hilliard*, 2 Rich., 286; *Parsons vs. Monteith*, 13 Barb., 358; or for breakage not caused by negligence: *Steele vs. Townsend*, 37 Ala., 247; *Nelson vs. Hudson River R. R.*, 48 N. Y., 498. And if the owner of goods seeks to recover from the carrier by proving the bailment by his receipt, he must take the receipt as a whole, and the defendant is entitled to the benefit of any exception which it contains in his favor: *Burroughs vs. Norwich, &c., R. R.*, 100 Mass. R., 26; and in the *Baltimore, &c., R. R. vs. Rathbone*, 1 West Va., 87; the words "at the owner's risk," in the receipt or bill of lading, were held to absolve the carrier from all liability not the result of negligence. It will be also remembered that in *Gould vs. Hill*, Cowen, J., argues, unanswerably as it seems to us, that no distinction can be made between such a receipt and the most express contract.

But the most thoroughly considered case upon the exact point is perhaps that of *Belger vs. Dinsmore*, in the New York Court of Appeals, decided at its September Term, 1872, and not yet reported. The case turned upon the effect of the receipt of an express company, given to the wife of the plaintiff for certain trunks and boxes delivered by her to the company to be carried. The receipt contained a notice that the company was not to be held liable for loss or damage to the property arising from the dangers of railroad, ocean, or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause unless occurring from the fraud or gross negligence of the company or its servants, and that the holder of the receipt should not demand beyond the sum of fifty dollars, unless otherwise expressed, or unless the property was specially insured, and so specified in the receipt. There was in the case no valuation of the property, nor any insurance. The property, which was proven

to have been of the value of about five hundred dollars, was lost. The court held that the receipt was a contract between the plaintiff and the company, and the plaintiff could not therefore recover more than fifty dollars, declaring that the presumption of law is that the party receiving an instrument in the transaction of any business is acquainted with its contents; that the instrument in question bore upon its face notice that it was not merely a receipt for the goods in the ordinary acceptance of the term; that there being no fraud, imposition, concealment, or improper conduct or practice of any kind on the part of the company or its agents, there was no rule or principle which required a party giving an instrument to another declaratory of their natural rights and obligations to prove affirmatively that the person receiving or accepting it had knowledge of its contents, in the absence of any proof or circumstances either to raise the presumption or inference of the want of such knowledge; that a person receiving a bill of lading on the delivery of property to a carrier for transportation in the usual and ordinary course of business, knows that it is a contract containing the terms and conditions upon which it is to be carried, and he, by the acceptance of it, assents to those terms and conditions; that such terms and conditions thereby become obligatory on both parties, and prescribe their mutual rights and obligations, and that the plaintiff in the case having paid freight at the rate prescribed for an article not exceeding fifty dollars in value, agreed to assume all risks for the excess in value, and to relieve the company from all liability on account of it beyond that sum, and could, with no more justice or propriety, claim its full value than the company could demand additional freight; that the court below had entirely overlooked the material fact in the case, which was that the plaintiff, by accepting the receipt as evidence of the defendant's obligation and liability, gave his assent to what was considered a proposal, and to all its terms and conditions, and that it thereby became operative and effectual as a contract. The same case is reported in 51 Barb., 69, but with a different conclusion from that arrived at by both the Court of Appeals and the Circuit Judge.

The rule, therefore, fairly to be deduced from the cases is, that where notice of his terms is brought home to the employer or bailor by the carrier in the very transaction of bailment, and the owner of the goods still employs him for their transportation, he thereby engages to abide by those terms, and the contract becomes sufficiently special to bind him; and that it will be no excuse for him that he did not read the printed notice in the receipt given him at the time, be-

cause, as is said in one of the cases, he did not choose to read it. Taken with the qualification in which the cases all agree, that such notice is to be construed strictly against the carrier, no fairer rule, perhaps, can be adopted. And certainly if the carrier is entitled to the benefit of reasons from the analogy of other cases, this rule can be vindicated by an unanswerable argument in his favor to be drawn from the law of general insurers, the conditions in whose policies, whether known to the insured or not, and though signed only by the insurer, are not only contracts, but absolute warranties; and from the almost precisely similar cases of telegraph companies, whose notices, given by printed blanks, are binding upon all who send messages by them, and that though never read by the sender: *Breese vs. United States, &c.*, 45 Barb., 274; *Ellis vs. Am. Tel. Co.*, 13 Allen, 226; Scott & Jarnagin on Telegraphs, §§ 205-210.

Some of the cases have not, however, gone to this extent, but have required proof that the owner of the goods gave his express assent to the terms of the notice. And in *Adams vs. Haynes, supra*, Walker, C. J., apparently with some feeling, denies that the employer can be thus bound unless his express assent to the terms of the notice be shown. Its application has also been denied where the conditions were printed on the back of the receipt: *Michigan Central R. R. vs. Hale*, 6 Mich., R., 244; where the receipt was delivered at night when it could not be read: *Blossom vs. Dodd*, 43 N. Y., 264; or to a foreigner who did not understand the language in which it was printed: *Camden & A. R. R. Baldauf*, 16 Penn. S. 67. Though these last two exceptions seem to be in conflict with the English cases as to the same point.

Whatever effect may be allowed to notices given in this manner, it has been conceded in this country as in England, that no formality is required in the contract and that it may be oral as well as in writing: *Roberts vs. Riley*, 15 La. An., 103; *Ill. Cen. R. R. vs. Morrison*, 19 Ill. R., 136; and it is believed that no case can be found in which the bill of lading of the carrier by water has been denied to be notice to the shipper of all it contains without further proof than its delivery to him. The idea that the carrier may restrict his liability by public notices has been so generally repudiated in this country that it would be idle to attempt to defend it. For although a disposition was shown to give effect to them when it appeared that they were known to the bailor in some of the earlier cases in this country, their authority seems to have been completely overslaughed by that of *Hollister vs. Nowlen*, *Cole vs. Goodwin*, and other cases

which have adopted their reasoning. But, as a question of strict law, there would seem to be but little doubt but that they are valid under such circumstances if carriers may contract upon this subject at all. No one will deny but that public notices may give rise to contracts as valid and as binding in law and in conscience as the most express stipulations between the parties; and it is equally true that they may with as much justice be made the means of avoiding obligations and liabilities not yet existing. It is also unquestionable that as a general rule of law those engaged in particular kinds of hazardous business may say to the public by public advertisement that they will be responsible only to a certain extent or upon certain reasonable conditions, and that those who, with full knowledge of such notice, employ them, do so subject to it. But carriers, from ideas of convenience and public policy, are denied the benefit of the rule. And they alone, for such reasons, are the excepted class. Now if it be denied that they can contract at all, as was done in *Gould vs. Hill*, we see the consistency of the rule, however we may differ as to its soundness. But to admit that they may contract so as to restrict their liability and yet say that it can not be done in a way open to those in all other vocations is an incongruity which can hardly be justified by considerations of inconvenience to the public. The same argument was urged upon the English Judges before the Carrier's Act, but while regretting that the law was so, they could not alter it. And as purely a question of law, without any admixture of public policy, it would seem that the true rule lies in one extreme or the other. But it is said by Bronson, J., in *Hollister vs. Nowlen*, and repeated with approval in a great many of the subsequent cases, that the mere delivery of the goods, after being informed of the notice, can not warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier than it does that he intended to insist on the liability imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities. Now, waiving the objection to this argument that it would apply as well to public notices given by others than carriers, it strikes us as very bad logic and much worse ethics. It amounts simply to this, that when the carrier relies upon his notice you may say to him, "True, I knew of it when I delivered my goods and paid you your reduced charges. I made no objection at the time, and if my goods had not been lost I should never have said a word; but now that they are lost I must tell you that I, all the time, intended to claim my common law rights and to hold you as an in-

surer." How much more manly and ingenuous is the view taken by Park, B., in a similar case. "If," said he, "it had been the intention of the plaintiff to make the defendants liable as common carriers, he ought to have tendered them a reasonable sum for the carriage of the chattel, and upon their refusal to carry, have brought his action for not carrying."

That there are some kinds of notice, affecting the liability of the carrier which may be given even by advertisement, or in any manner how general soever, seems admitted; as for instance, that he will carry only certain description of property, goods of a certain value, or that he must be paid a certain premium for increased risk, and in proportion to the value of what he carries. (Angell on Carriers, §§ 234-235.) Such notices are said to be *reasonable*, because their object is not the exoneration of the carrier from liability, although they may qualify it. Are we to conclude then that public notices are available to the carrier or not, as they may be thought to be reasonable or unreasonable? And if this be so, who is to decide upon this question? Are the Courts, after having settled the general principle that public notices by carriers intended to restrict their liability as insurers, are void on grounds of public policy, to go further and make exceptions of such as are reasonable, and then decide in each case whether it comes within the rule or the exception?

These are embarrassing questions, and could have been only avoided by following in the footsteps of the English Judges, who, it seems, in dealing with the subject, have never stopped to consider the convenience or inconvenience, or the reasonableness or unreasonableness of such notices, except so far as they were authorized to do so by legislation. But whatever might be said in favor of this course, if the question were *res integra*, as a legal proposition, leaving the evils, if any, which might follow, to be remedied by the law-making power, the expression of opinion has been too general in the other direction, to expect a retraction. And, in fact, the subject can be one of but little practical importance at this day, as those who are mainly engaged in the carrying business, would not now, even if allowed, resort to public notice, both because of the difficulty of proving knowledge of it, and of the greater convenience and certainty of the mode now adopted of giving it.

We confess that we are not of those who would, at this day, put the carrier and the hotel-keeper—the two outlaws—upon the Procrustean bed of the carrier and inn-keeper of two centuries ago. Anciently, as we are told, the extraordinary severity of more modern

times did not exist as to them in the common law. Nor does it now exist by the laws of any other civilized country where that law was never adopted. We are told that it was engrafted upon it in the first instance not because of any reward paid to the carrier or the inn-keeper, but because of the public necessity, to guard against the combinations of carriers and inn-keepers with thieves; (Story on Bail, §§ 489-490.) From which we are led to infer that carriers and inn-keepers in those days were considered no better than the thieves.

Such severity at this day as to these excepted classes is not only out of all harmony with the general law, but is authorized by nothing in the character of those now engaged in these occupations; and we venture the assertion that nothing has been gained by it to the public in the long run, at least for the last half century. It has resulted as we know in many hard cases to both the carrier and the inn-keeper, but that the public has been benefitted thereby, is more than doubtful, seeing that all such burdens, though imposed immediately upon these two classes, fall upon their employers in the end upon the same principle on which the tax upon the producer of the necessities of life, falls at last up the consumer.

Much of the difficulty on this subject could be avoided by recurring to the reasons for the extraordinary liability of the carrier as stated in the old books, and discarding the idea that it rests upon his public employment, and "the necessity of the thing," from the danger of his combining with thieves and other such suppositious and unsatisfactory reasons, and coming at once to the point that, like those in all other vocations, the carrier does his work and assumes his responsibility because he is paid for it. "He has his hire," says Lord Coke, "and thereby undertaketh to deliver the goods which are delivered to him." "He is reliable in respect of his reward;" 1 Salk. 143.

This, at last, is the good sense of the matter, and any other reason in this practical age, but for our familiarity with it, would sound far-fetched, and to the unprofessional business man at once suggests the inquiry whether there are not others besides carriers engaged in public employments, or who are not as likely to combine with thieves. This, at least, is the way in which it is understood between the carrier and his employer, whatever the legal theory may be. A few lines of legislation based upon this idea, allowing, for instance, the carrier to engage as carrier merely, with the responsibility of an ordinary bailee for hire, or to assume the double character of carrier

and insurer by contract, and the payment of the increased charge for such insurance, with such restrictions and regulations as to the burden of proof in case of loss as would at once suggest themselves as proper, might relieve the whole subject of embarrassment. Such is the leading idea in the English legislation on the subject.

The law as to the carrier's liability is not now in practice, however it may be in theory, as in the days of Rolle, even where there is no attempt to restrict it by contract or notice. No judge in this age would permit such a verdict as that in *Kenrigg vs. Eggleston*, to stand for an instant, and the jury which should render it would, perhaps, be reproved. That carriers are insurers against all losses not occasioned by the act of God, or the public enemy, though retained as a formula in the books is, at best, but a presumption of law. It was soon discovered that all the dishonesty was not on the side of the carrier. The public began to play its tricks on him, and the Courts found that plain justice required them to innovate upon the rule in order to protect him. Such was the case of *Gibbon vs. Paynton*, 4 Burr. 2,300, where the employer hid his money in a bag filled with straw to reduce the expenses of the carriage. The bag was lost and so was the money; but Lord Mansfield held that that was not fair dealing with the carrier, and that the plaintiff could not recover. And ever since it has been held that any attempt to deceive, mislead or impose upon the carrier by concealment of the character or value of the goods bailed with him for carriage, exonerates him. And this, whether there be fraud on the part of the bailor or not. Nor can he be held, if the thing being carried perish by its "own inherent vice," or perishable nature; nor if cattle or live stock perish by its own viciousness, or from causes unavoidable on account of their nature; nor if the goods be taken by execution or attachment, whether against the owner or a third person; nor for loss occasioned by the neglect of the owner; nor if the carrier has acted according to well established usage in the particular business, or as to the particular goods; nor where the law of his liability is changed by a particular course of dealing between the parties. Thus we find many exceptions to the rule besides those arising from contract, but for which it would be intolerable.

To what an extreme those who wholly deny the right of the carrier to contract for a diminished liability, have been compelled to go, in defining the nature of his employment, is worthy of notice. It has been insisted by them that carriers were to be regarded in the

light of public employees, owing duties in that character to the whole public, which, on grounds of public policy, they could not be permitted to divest themselves of, even by contract. That their duties to their employers did not and could not arise from contract, but were governed by a higher law, and therefore could not be varied by contract. That they are more than insurers. That they are the servants of the public on whom rests the same sort of obligation to keep the goods entrusted to them, as the jailor is under to keep his prisoners, and that they can no more make a special-acceptance of such goods than the jailor can of his prisoners; (Cowen, J., in *Cole vs. Goodwin*.) That they were by the common law a peculiar institution of the English people, similar in its policy to the law which made the hundred liable for murders and robberies. (Am. note to *Coggs vs. Bernard*.) If such be the law, we should admire the hardihood of the man who would embark in the business as it is now carried on. But we believe that such conceits receive no countenance from the English cases, not certainly from the case of *Coggs vs. Bernard*, in which Lord Holt, after strongly stating the law as to the carrier's liability, says, "It is *allowed* by reason of the necessity of the thing."

By those, however, who are willing to concede the right of the carrier to contract upon this subject of his liability, a very different and, as it seems to us, a much more rational view has been taken of the relative rights of this "peculiar institution," and the aforesaid public. According to them, transactions between the carrier and other parties who employ him, involve simply rights of property and concern them alone. The public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in the face of a special agreement for its relinquishment. In one sense, it is true he exercises a public employment, and has duties to the public to perform. He is bound to accept all goods offered within the course of his employment, and he is liable to an action in case of refusal. He can make no discrimination between persons or vary his charges from their condition or character. In the absence of contract the law fixes his liability. But he is not for these reasons debarred from contracting as to such liability with parties who are willing to contract with him. See *York Co. vs. Central R. R.*, 3 Wall., 107.

That the latter is the correct opinion, no argument or authority is needed to show. It is now, we may say, universally conceded. The

strange thing is that the other idea should have been advanced after it had been settled law for one hundred years that the carrier might be sued in assumpsit for breach of his contract as well as in tort, and when, in fact, it was the common form of action against him both in this country and in England.

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DOWER IN QUALIFIED FEES.

There is, perhaps, no subject in the law so confused by text-writers as that of dower or curtesy in certain classes of qualified fees, and although the cases occur less frequently than formerly on account of the simplicity of modern conveyances, yet it would be very gratifying if the principle herein applied relieves the subject of any of its perplexities and reconciles the classes of cases, the distinction between which, Mr. Washburn says, is apparently so subtle that the attempt may be of little use.

The principle is not new, but an original and cardinal element of both dower and curtesy, and needs but to be stated to have the acquiescence of lawyers. It is its application merely to the various classes of estates which, for the first time, it is believed, is to be made. The principle is that dower does not attach when the seisin of the husband is defeated *ab initio* by the determination of his estate; but, the other circumstances concurring, it does attach when the seisin is not so defeated.

To save repetition, it may be as well here to state that the rules governing dower and curtesy are the same *mutatis mutandis*—the actual seisin and birth of issue necessary in curtesy—being granted. This principle will be applied to the different kinds of freeholds of inheritance in the order of their classification below.

All inheritances may be divided into two great classes, that is to say, they are either estates in fee simple absolute, or estates in fee simple determinable. Nothing need be said about estates of the first class, except that if the heirs fail dower has never been refused unless on account of statutory provisions. Estates in fee simple determinable, or qualified, may be subdivided as follows: (1.) Base fees, technically so called at common law, which are either estates upon condition proper (or condition in deed); or limitations (or conditions in law, as they are usually called). (2.) Estates in fee simple conditional converted by Statute *de donis* into. (3.) Estates in fee tail, and (4.) Estates in fee determinable by conditional limitations.

This classification of determinable, limited, or qualified fees is the same as that adopted by Blackstone, except that base fees are here

divided into two branches in the first instance; with Blackstone estates in fee upon condition proper are subsequently, (in his chapter on estates upon condition) referred to this head. A fourth class is here added, not specially designated by him.

Of this, briefly in its order:

1. Base fees. All determinable fees may not improperly be styled base fees, because not pure or absolute, but it is intended under this head to include only base or qualified fees technically so called at common law. Thus understood, a base fee may be defined to be such an estate of inheritance as has a qualification annexed thereto, whereby the estate may be defeated or shall expire, and is of two kinds. (1.) Estates upon condition proper at common law or condition in deed; and (2.) Limitations or, as they are denominated by Littleton, and usually called, estates upon condition in law.

The first kind of base fees—those upon condition proper may, in fact, be either upon condition precedent (*i. e., precedent* to the arising of the estate,) or upon condition subsequent (*i. e., subsequent* to the arising of the estate and which tends to defeat it). It being supposed that the estate has arisen and has been defeated by condition subsequent, and the question being whether dower attaches to the defeated estate, it is only necessary under this head to consider estates upon condition subsequent, and the definition above is accordingly restricted.

These estates are created by words denoting pure condition, such as "*sub conditione*," "provided that" "if, however," etc, or by imperative implication, and a careful distinction is intended to be made between such words or implication, and words denoting limitation or duration—the importance of the distinction will be seen presently.

Conditions may be annexed to every species of estates in real property. 2 Th. Co. Lit. m-p., 3-4; 2 Bl. Com. m-p., 154, but estates in fee upon condition are only to be noticed, and the following cases put by Coke and Littleton, will serve for examples. Feoffment, of Black Acre, to A. in fee, upon condition that he shall not alien White Acre. 2 Th. Co. Lit. m-p., 27. Feoffment to A. in fee, reserving a yearly rent, upon condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter. *Id.* m-p., 3. In either of these cases, if the condition is broken, the estate is not absolutely determined, but voidable, to give effect to the condition the feoffor or his heirs would have to enter, and upon so entering, would be seised *as of his or their original estate*—holding as if the estate upon condition had never been made, and thereby

defeat *ab initio* the seisin of the late foffeee, or his heir. *Id.* m-p., 3-4; 100, n. (W. 2). Butler's note (2) Appx.

And this is the reason why at common law there could be no limitation over after the grant of a freehold estate upon condition proper. The grantor upon entry being in of his former estate the limitation over was defeated. Nor could there be a remainder over after the grant of such an estate, because by the definitive idea of a remainder it must take effect, if at all, after the regular expiration of the particular estate, and not in derogation of it. Butler's note, (2); 2 Th. Co. Lit. Appx.; *Id.*, m-p., 87-88. Fearne Cont'g. Rem., m-pp., 261, 264. With this high authority to sustain this doctrine as the common law, the writer will not be thought guilty of bold assumptions in order to apply the principle set out with, when it is stated that Blackstone is inaccurate in using the following language. "Yet though *strict words of condition* be used in the creation of the estate if, on breach of the condition, the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, this the law construes to be a *limitation* and not a condition." 2 Com. m-p., 155. The only authority relied on by him is the case in 1 Ventris, 202. This report is not accessible, but Judge Tucker says it was the case of a devise, [operating under the Statute of Wills,] and for the same case, he refers to 2 Lev., 21-22. This eminent Judge says: "I am aware of no case in which words imperatively creating a condition in any conveyance except a devise or conveyance to uses, has been construed to be a limitation or conditional limitation, because of the remainder over." The cases of *Wigg vs. Wigg*, 1 Atk., 282, and *Page vs. Haywood*, 2 Salk., 570; 11 Mod., 62, he says, were cases of devises, and refers to *Croke, Jac. 57*, 2 Hovenden's, Supp., 290, and the note to 14 Vesey, 341. See 1 Tucker's Com., Bk., 2, 91, 144. It will be borne in mind that Judge Tucker wrote his commentaries in 1826, some twenty years prior to the Statute 8 and 9 Victoria, hence the cases under his observation, where the limitations over were held good were devises or conveyances to uses operating under the Statute of wills or Statute of uses. But, however this may be, it will certainly be granted that there could be no limitation over if the first estate was a determinable fee, and it only remains to be added that in this kind of base fee, the seisin being defeated *ab initio* by entry for condition broken dower would not be allowed. The second kind of base fee called a limitation, sometimes, an estate upon condition in law, may be defined to be an estate expressly confined and

of mere limitations, and a limitation merely shifts the estate from one person to another, leaving the prior seisin undisturbed."

The above is true as to estates in fee simple, fee conditional, and fee tail, but not always true as to the executory devise, for this may be after an estate upon condition proper. Dower in estates defeated by executory devises, however, is allowed upon the principle of the seisin not being defeated *ab initio*, but for different reasons, as the the Professor afterwards suggests. But this is anticipating. If any further reason is needed to show that conditional fees were not given upon condition proper, it can be found in the nature of a condition itself, for, as is well said by Blackstone in this connection, though for a different object: When any condition is performed it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. Now, when this logical result of performing the supposed condition is applied to these estates, what do we find? Does it become a vested fee simple *proprio vigore*, as upon the performance of condition subsequent when attached to other estates? Certainly not. If the issue did not alien the donor would still have been entitled to his right of reverter; for the estate would have continued subject to the limitations in the original donation. *Nevil's case*, 7 Rep., 124; *Willion vs. Berkley*, Plowd., 23-247; Lord Mansfield in *Buckworth vs. Thirkell*, 3 Bos. & Pull., 652, note.

It seems to be clear that these limitations were construed to be conditions contrary to natural reason, and for the purpose of effectuating a policy of convenience which did not extend to defeating the much-favored estate of dower. Properly construed, then, these feudal donations were not upon condition, but were limitations to a certain class of heirs, upon failure of which the common law gave to the donors and their heirs their *formedon in reverter*. The seisin of the donee and his heirs was not defeated *ab initio*, but expired naturally and upon principle, dower attached to his estate as a prolongation thereof.

3. Estates in fee tail. These were by virtue of the Statute, Westminster 2, 13 Ed., I., commonly called the Statute *de donis*, the ostensible object of which was "to preserve the inheritance in the blood of them to whom the gift was made," but the real object of which was to secure to the donors and their families their rights of reverter, which previously the tenants could defeat by alienation upon the birth of issue. 1 Th. Co. Lit., 513, and Mr. Hargraves' note (B).

This Statute created no new estates, but merely *preserved* estates in

fee simple conditional to the issue indefinitely, by preventing alienation, and as the estates were preserved, so were the incidents belonging to them, among others the right to dower and curtesy. Butler's Note (1), Appx. to 3 Tho. Co. Lit. The Judges, however, divided the estate into two parts, leaving in the donee what they denominated a fee tail (*feodum talliatum*—mutilated inheritance), and investing in the donor the ultimate fee simple, which they called a reversion. 2 Bl. Com., m. p., 112. Before the Statute the donor's interest was a mere possibility of reverter. This celebrated Statute revived in a much greater degree all the inconveniences which existed under the ancient law, and about two hundred years after its enactment, the Judges, in order to alleviate the common grievance of the realm, openly declared a common recovery sufficed to be a sufficient bar to an estate tail.

Taltarum's case, 12 Ed., 1 V., 2 Bl. Com., m. p., 116. This was a bold step, and but for being countenanced by the King, would hardly have been taken, yet it was almost rendered necessary by nearly the same state of affairs which hundreds of years before caused their predecessors to resort to the subtle finesse of construction in regard to conditions in order to shorten the duration of conditional fees. But as no new estates were created by the Statute *de donis* the rule in regard to dower and curtesy in conditional fees was applied to fee tails.

4. Estates in fee determined by conditional limitations. It is in reference to these estates that the text books are in the greatest confusion, and without some principle for a guide it is impossible to reconcile the conflicting views of the writers. The simple principle herein stated will not be questioned; it may be difficult to apply it to the particular case, but when the characteristics of these estates are borne in mind it will be comparatively easy. They will be briefly stated as understood by the writer. The term conditional limitation, itself the cause of much confusion, is frequently employed to denote as well the first estate, *i. e.*, the one to be determined, as the estate which is to pass over; properly it applies only to the subsequent estate, and in this sense it is to be understood in what follows. All future estates are remainders, reversions, or conditional limitations as herein defined. The common law remainders and reversions need not be noticed, and only conditional limitations arising under statutes modifying the common law be attended to.

Conditional limitations then, may be defined to be those estates which were not good as remainders or reversions at common law,

but have their force and effect under the Statute of Uses, 27 Hen. VIII, or Statute of Wills, 32 & 34, Hen. VIII, or Statute 8 & 9 Victoria, (and the corresponding statutes in most of these United States), and are naturally divided into classes as they arise under the respective statutes.

1. Conditional limitations arising under the Statute of Uses, 27 Hen. VIII, e. g. covenants to stand seized of Black Acre to the use of A. and his heirs, but if A. die without issue living at his death, to the use of B. and his heirs, or Feoffment of Black Acre to the use of A. and his heirs, but if B. return from abroad to the use of B. and his heirs. It will be observed that the subsequent limitation in either case would be void at common law, considered either as a limitation after a freehold estate upon condition, or as a remainder, for reasons already stated, and for the additional reasons that a fee could not be upon, or a remainder limited after, a base fee. But the Statute of Uses among other great changes made a radical innovation upon the common law in regard to the creation of freehold estates, and by freehold estate is meant any estate of *indefinite* duration. This statute in effect dispensed with the feudal doctrines of tenure, including *livery of seisin* to create, and *entry* to determine, a freehold.

Uses, introduced by the ecclesiastics and enforced by their Chancellors, can be neither seen nor handled—*livery of seisin* and *entry* can be made neither of nor upon them: they were ignored by the common law; and so the Chancellors, in regulating and enforcing them, legislated very much as they wished. They allowed them to be conveyed, devised and limited *in futuro* almost *ad libitum*. Now when the Statute "for transferring uses into possession" was made the *cestui que use* became the owner of the land itself, in cases within the Statute, to be held *after such quality, manner and form and condition* as he before held in the use, and of course subject to any future limitations by way of condition or otherwise. Thus the old doctrines of *seisin*, *livery*, *entry*, and the like, were virtually abolished, and upon the happening of the contingencies provided for, the subsequent estates arose or shifted *by operation of law* without defeating *ab initio* the prior *seisin*; and in cases of fees determined by these springing or shifting limitations, dower should be allowed upon principle and not upon the weight of authority, as an exception.

2. Conditional limitations arising under the Statute of Wills, 32 and 34, Hen. VIII, commonly called Executory Devises.

After the introduction of the Feudal system into England, and prior to the Statute of Wills, lands could not be generally devised;

but any kind of future estate could be limited by way of use, as well by will as by deed, provided the rule adopted against perpetuities was not violated, but by the terms of the statute for transferring uses into possession, the seisin necessary to support a use at once passed to the *cestui que use*, and it was no longer possible to devise land by way of use in any manner. When this result was generally known there was such an universal complaint, that within five years after the Statute of Uses was enacted, the Statute 32 Hen. VIII, afterward explained by 34 Hen. VIII, was passed, allowing lands held in fee simple to be devised to natural persons.

In construing this statute the courts adopted the rules which the Chancellors had before applied to devises of uses; the executory devise arose or shifted just as in case of the executory use, by mere operation of law, and disturbed the prior seisin no more than was necessary to vest the subsequent estate, and when the prior estate was a fee dower was allowed upon principle as in the former case. The preceding examples taken as devises will serve as illustrations of executory devises.

3. Conditional limitations arising under the Statute 8 and 9 Victoria, providing that all lands as to the *immediate freehold thereof shall lie in grant as well as in livery*. This statute puts a complete end to the common law doctrine of *livery of seisin*; it was no longer necessary in any case. All those future limitations which previously could be effected only under the Statute of Uses or the Statute of Wills, could now be made by a simple deed, the subsequent estate being made to spring or shift, upon the happening of the contingency, by force of the deed creating it. The prior seisin was diverted, but not defeated *ab initio*, and dower allowed as in the above cases. The same examples, taken as grants, will serve here.

With these elementary distinctions in mind, the views of some of the most celebrated text writers may be briefly considered and compared with the leading cases. In the first place, in regard to that class of base fees called limitations in the classification above, Mr. Washburn, in the third edition of his work on real property, Vol. 1, m. p. 208, says: "So when the husband is seized of a base or a determinable fee, and the same is determined by the happening of the event upon which it is limited, the right of dower on the part of his wife or widow ceases," citing 2 Crabb Real Prop., 166; Seymour's Case, 10 Rep., 96; Com. Dig. "Dower," A. 5, "and," he proceeds, "upon this principle the case of *Ray vs. Pung* was decided, 5 B. & Ald., 561." He might have added 3 Preston's Abstracts, 372, and

14 Kent Com., m. p. 49, which sustain him fully. See also 1 Wash, 134-5. The case of *Ray vs. Pung* is not accessible, but he puts it thus: "Lands were conveyed to A. B., and his heirs in trust, for such uses as C. D. should by deed appoint, and in the meantime and in default of appointment to C. D. in fee." Ch. Kent cites this case to sustain the doctrine that *the wife is not dowerable of a trust estate*: 4 Com., m. p., 43. And if this is not the principle upon which the case was decided, the effect of the execution of the deed of appointment upon the wife's right of dower was considered so doubtful that in such cases all the great conveyancers used to give an interposed estate to a trustee, in order certainly to bar the dower: 2 Tho. Co. Lit., m. p. 592; note (B. 3d) by the editor; Sugden Pow., 432. Moreover, no such limitation as this was known to the common law. Its object could only be effected under the Statute of Uses by the doctrine of powers. Certainly, the example is not a good one, and its authority for the asserted doctrine very questionable. It was the other authorities, including those added, which made the difficulty. Now, the principle contended for, as governing this class of base fees, or limitations, is that when the estate comes naturally to an end by the efflux of time, the seisin being only determined from that time and not *ab initio*, dower should be allowed. Mr. Crabb, after saying that where the donor enters for breach of conditions, as the entry absolutely defeats the estate of the tenant, so it defeats the wife's right to dower, very shortly concludes as follows: "So where a person has a qualified or base fee, the right to dower ceases when the estate is determined," and refers only to Seymour's case, 10 Rep. Mr. Preston refers to no authority, but makes the simple assertion. Ch. Kent refers to Preston, and to Butler's note (170) to Co. Lit., 241, a., being the same note (1) to 3 Tho. Co. Lit. Appx., above referred to. And Mr. Atkinson lays down the same doctrine: 1 Atk. Com., 255. The only adjudicated case is 10 Rep., 96, Seymour's case. This report is not accessible, but, as may be gathered from Mr. Butler's note above referred to, and IX Viners Abridg't "Dower" (F. 10), where the case is cited, it does not sustain the broad assertions of Preston, Crabb, Kent, Atkinson, and Washburn, for it seems that Seymour's case was one where the *bargainor himself* was tenant in tail, and sold the land to H. and his heirs. It was held that "H. has an estate descendable and determinable upon the death of the tenant in tail, and his *wife shall be endowed determinable on the death of the tenant in tail*; resolved in Seymour's case, Mich. 10 Jac." See, also, 1 Cruise Dig.,

46. The distinction is between the grant of a determinable fee by one seised in fee simple and the grant of a fee simple *by one seised only of a determinable fee*. The reference to Comyn's Digest gives the following: "A wife shall not be endowed where the estate of the husband is determined: as, if a feoffment or covenant to stand seised, &c., be to the use of B. and his heirs till C. marries; B. dies, his heir takes a wife and dies, and then C. marries, the wife shall not be endowed: Dub. 1 Rol., 676, F." *This case is cited with a doubt.* The Judges were equally divided "*Scilicet*, Crawley and Vernon, that she shall not be endowed, and Hutton and Heath *e contra*." IX Viners Ab. Dower (F. 1), where the case is stated more at large, and as follows: "If A., seised in fee of lands, covenants to stand seised thereof to the use of himself and his heirs till C., his middle son, takes a wife, and after to the use of C. and his heirs, and after A. dies by which it descends to B., the elder son of A., who has a wife and dies, and after C. takes a wife, it seems the wife of B., the elder son, shall not be endowed of the said estate of her husband; because his estate is ended by an express limitation, and therefore the estate of the wife, being derived out of it, this can not continue longer than the original estate: P. 10, Ja. B., between Flavill and Ventrice, *dubitat* upon a special verdict." Then follows this statement to the contrary: "If a feoffment be made to the use of J. S. and his heirs until J. D. has done such a thing, and then to the use of J. D. and his heirs, and afterwards the thing is done and J. S. dies, his wife shall be endowed: Per Anderson Le 168, in pl. 233 Mich., 31 and 32 Eliz. C. B." To this may be added Mr. Butler's note itself. Appx. 3 Tho. Co. Lit. (1), where he says: "If the estate is to continue only till a certain event, or is made determinable upon [more properly, determined by,] some particular event, the wife is to enjoy her dower or the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue," for which he cites the case in the note to Fitzh. Nat. Brev., 149, G., and the cases of *Flavill vs. Ventrice*, 1 Roll. Ab., 676 (doubtless for the dissenting opinions of Hutton and Heath), and *Sammes and Payne's case*: 1 Leg., 167; 1 And., 184; 8 Rep., 34; Gould's, 81. Which authorities, if they sustain what he cites them for, must be yielded to.

In the next place in regard to those estates defeated by conditional limitations. Mr. Washburn draws the following heart-rending picture for the student: "Butler has a very elaborate note to Coke., Lit., 241, a., in which he attempts to assist as he calls it, in clearing

up the complex and abstruse points of learning in which this question is involved." Judge Kent says, "that the ablest writers upon property law, are against the right of the dowress when the fee of the husband is determined by executory devise or shifting use." Atkinson states the law to be thus: "When the husband's estate is defeated by title paramount as by entry, for condition broken, by reason of a defective title in the grantor or by shifting use, the right to the dower is also defeated; but where the husband's estate has been defeated by executory devise it has been settled, rather anomalously, it has been thought that the widow shall, nevertheless, be entitled to dower. Preston leaves the point as doubtful. Burton says, "when the husband or wife has an estate in fee subject to be diverted by a shifting use or executory devise, it has been a disputed question whether these rights may not be enforced after the event, and notwithstanding the diverting and destruction of the estate upon which they are attached.

"One of the leading cases," continues Mr. Washburn, "upon this subject is *Buckworth vs. Thirkell*, which is said by Judge Kent to be opposed to the opinion of the ablest writers on property law: while, Ch. J., Best says, "that though questioned, it has become the settled law, and cites in that connection, Lit. § 53." 1 Wash. Real Prop. m. p. 213-214. Though recognizing the distinction between common law estates, and those arising under the statutes, the Professor does not offer a solution to the difficulty, and probably cannot, so long as he violates the principle by contending that dower should not be allowed after the determination of that class of base fees described herein as limitations. It being admitted that in these estates the seisin is only determined—not defeated *ab initio*, the whole doctrine becomes confused and inexplicable if dower is refused, otherwise it is clear and simple. Upon this principle also depends the doctrine of *dos de dote peti non debet*, as where the ancestor of a married man dies and he endows the widow of such ancestor of one-third of the lands which descended to him, and dies, his widow will only be entitled to a third of the remaining two-thirds, for when the heir endows the widow of the ancestor, the assignment relates back to the death of the ancestor, and defeats the seisin which the heir acquired by the descent of the land, so that the widow is in of the estate of her husband, and the heir is considered as having never been seised: 1 Cruise, Dig., 153. And also by analogy, the common law doctrine that a divorce *a vinculo*, bars dower, which was for sometime doubted. By this divorce the marriage was dis-

solved *ab initio*, and no seisin beneficial to the *de facto* wife ever vested in the man. 1 Th. Co. Lit. m., p. 572. Id. 126, note D. And so when the husband was evicted by title paramount, the seisin was defeated *ab initio*.

Buckworth vs. Thirkell, 3 Bos. Pul. 652 in the note, decided by Lord Mansfield is the leading case on the subject of curtesy in estates defeated by conditional limitations, and though it is said to have made a noise in Westminster Hall, and has been much doubted by text writers and Lord Alvanley in the above case, it has never been overruled in England. In this case the rest of the court assenting, curtesy was allowed, though it is difficult, and, upon principle, useless, to conceive the distinction drawn by Lord Mansfield between a conditional and a contingent limitation. The dower case of *Goodenough vs. Goodenough*, in 1775, according to Mr. Preston, 3 Abst., 372, decided the same as the above, and the case of *Moody vs. King*, 2 Bing. 447, decided by Ch. J. Best, and an unanimous court, confirms these two cases, expressly overrules Lord Alvanley's doubts, and establishes beyond question the law of England on this subject. The text writers generally yield an unwilling assent to these cases, and say they make an exception to the general rule, but it is hoped that enough has been said to show that the doctrine is founded in principle, as well as by authority. It is hardly to be supposed that the case of *Ray vs. Pung*, 5 B. & Ald., 561, intended to overrule these cases. It must have been decided upon the grounds stated above, where it is quoted, else it would not have been passed with so little notice from the modern writers, and Ch. Kent especially, would not have stated that it proceeded upon the principle that the wife is not dowable of a trust estate.

The American cases, so far as can be ascertained, are nearly unanimous in following the English on this subject.

The Pennsylvania case of *Buchanan vs. Sheffer*, 2 Yeates, 374, and the Virginia case of *Taliaferro vs. Burwell*, 4 Call., 321, decided a few years after *Buckworth vs. Thirkell*, but without any reference to it, and in all probability, in ignorance of it, and of each other, head the list in allowing, the one curtesy, the other dower, in a fee determined by a conditional limitation. To which may be added *Hay vs. Mayer*, 8 Watts, 202; *Grout vs. Townshend*, 2 Hill, 554; *Milledge vs. Lamar*, 5 Desauss., 637; *Northcut vs. Whipp*, 12 B. Mon. 65; *Kennedy vs. Kennedy*, 5 Dutch. 185; *Evans vs. Evans*, 9 Penn. St., 190, and the moot court opinion of Professor Brocken-

brough in *Wilson vs. Wilson*, reported in July number of this REVIEW.

It seems that the New York cases of *Weller vs. Weller*, 28 Barb., 588, and *Hatfield vs. Sneden*, 42 *Id.*, 622, hold a contrary doctrine, but they stand alone as far as can be discovered. The Judges were possibly influenced by the opinion of Ch. J. Kent, as *Buckworth vs. Thirkell*, is examined in the latter. The cases are not present, but admitting them in their full force they are overbalanced by a very decided weight of authority.

Professor Brockenbrough, in his moot court opinion, hinted at the principle herein applied, and it is perhaps to be regretted that he did not consider "the great point in the case," more upon principle, than upon authority, and apply it to the various classes of estates.

It may also be added that the views above stated, were imbibed from the learned Professor Minor of the University of Virginia, and whatever of merit is in them should be attributed to him.

EDMUND S. MALLORY.

Jackson, Tenn.

CONSTRUCTION.

Sir William Blackstone begins his far-famed commentaries by telling the student that law is "a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong." As has been suggested by one of the most eminent men of this country, this definition is inapplicable to our system of government. The expression, "supreme power in a State," being too general, would not be sufficiently concise to restrain this power of prescribing a rule to that branch of our system of tripple supremacy. Our laws are now prescribed by the *supreme legislative power* in a State, while part, yea, two out of three of the component departments in which our supreme power is lodged has no voice in making laws. Beyond this, I venture the assertion that this definition, though corrected as above suggested, is defective. "Commanding what is right and prohibiting what is wrong," can not in any sense be taken as a clear and correct definition of the office of a law. To rightly understand why this is so requires a short investigation of the origin of law.

Law is the result of a social compact by members of the human family establishing and pointing out what powers each one surrenders up to the general good, and an enumeration of rules to prevent an exercise of such powers. It is the declaration, the articles of confederation that contain an enumeration of those powers which each one had in a wild, unsocial and unrestrained state, and which are surrendered as being in exercise incompatible with the well-being and prosperity of society. It is not a surrender of a *natural right*, as some lawyers hold, but the giving up of a *power*. Without the restraint of society one man could take the life of another with impunity. That would be the exercise of a *power* to which he never had a *natural right*. No one has a *natural right* to defraud another, or rob him of his substance, yet without law he has the power to retain the advantages accruing to him from false representations and unjust acts on the one hand, or to repel the rightful owner from recovering that which has been forcibly taken from him. Hence, without multiplying examples to a tedious length, it is clear that the law takes not away from an individual any *natural right* that he had before

the institution of that law, but simply deprives him of a power the exercise of which would do more injury to society than good to the individual exercising it. The natural rights of men must have their foundation in the great principle of even-handed justice. They are the gift of a God who must have intended all of them, conflicting though they may appear at first glance, to blend harmoniously together, and no one to infringe the province of another. When one has a right, no one ever did or ever can have a *natural right* to infringe it. He may think he has, others may think so, but that proves nothing further than that human intelligence is fallible and subject to err.

If I have a *right* in or to a horse, what gyrations of the reason can give John Smith a *natural right*—even throwing law to the winds—to take my horse and appropriate him to his own uses without my consent? The very ownership of the horse is an artificial right. Law then simply prescribes to John Smith what power he shall *not* exercise that he might be able to assert were he not restrained. It says to Smith: You can not take another's horse; that is a power (not a right) you surrendered when you became a member of society. This being the case, it results that a law has for its legitimate premises and field of operation simply the *prohibition of wrongs*. Even when in the form of a declaration of rights it is in fact the prohibition of the perpetration of wrongs. For instance, take the Declaration of Rights in the Alabama Constitution of 1868. A Constitution is nothing but a higher, a fundamental law, a law put upon a superior footing by the solemn agreement of the citizens adopting the same. Sec. 4 provides "That no person shall be deprived of the right to worship God according to the dictates of his own conscience." This really at first view looks like a declaration of a right, when in fact it operates as a prohibition of a wrong, and manifestly must be so construed. It obtained this declaratory form from the ostracising spirit of the middle ages, when toleration was a name and nothing more; when it was necessary to protect the weak from the persecutions of those whose faith overleaped their doctrine, and became fanatical. It cannot be a declaration of rights proper, because there is not now, nor has there been for some hundreds of years, any necessity for making such a declaration. Before the Constitution of Alabama was adopted, popular opinion, backed by a strong sense of natural justice, established this doctrine, and for long years no one in Alabama had tried to prohibit the free worship of God if consistent with other's rights. If it was a declaration it proclaimed no new right, it

gave men (so far as this section is concerned) no new right, it clothed them with nothing that all men did not concede to them before. Hence, it becomes not a declaration of a right, strictly speaking, for that implies something in the nature of a gift but it is the *prohibition* of a *wrong*, or the prevention of the worship of God according to one's own conscience. It is rather a declaration of wrongs, for the presumption is that all men retain every right and power that pertained to their original state before the organization of society until it is shown that those rights or powers have been conceded by them. Jones lays down his coat, and Smith takes it away. Before Smith can be convicted of larceny it must appear that the original right or power of occupancy has been taken away. Before law was established, the theory of occupancy would have made the coat Smith's property as soon as he took possession of it, and the presumption is that he had a right to it until it is shown that the law has superseded this idea of occupancy.

It is but another form of the presumption that all men are innocent till they are proven guilty. It seems clear then to me that the original purpose of law was to prohibit wrongs, and not to declare rights; and that the above quotation from the Alabama Constitution was intended not as a declaration of a natural right, but a prohibition for all time against the legislative encroachments upon the recognized principles of justice. Hence, Mr. Blackstone's definition is erroneous, because of a lack of certainty. A legal definition should be of the highest type of certainty; it should define the idea in positive language that has also such an exclusive and negative force as to prevent the entering of any other idea.

Thus, the origin of law and the necessary presumption attending it, forms one of the most important things to be learned by the student of that vast and almost infinite science. It would scarcely be overrating its value to say that no one can be a great lawyer without a thorough study of the origin of law, for the term "construction" can not be understood without extensive research.

2. Under this head may be classed some of the most important constitutional questions that have from the beginning of our separate national existence down to the present day claimed the attention and profound wisdom of the courts, and agitated the public mind. From the earliest days of our history as a separate independent nation the question of the liberal and stringent construction of the Constitution of the United States has been the theme of public orators, the hobby of demagogues, and the real vital question of

national politics. A strict construction of that instrument against the Federal Government, was at first adopted by a vast majority of the people and the courts. While these things are in their character, slightly tinged with politics, yet a reference to them will, I hope, be pardonable, since the existing state of the nation's affairs must always have more or less weight upon the construction of any public instrument by the courts. It was early decided by the national courts, that the Federal Constitution consisted of powers expressly delegated to the general government from the people; that these powers were specifically enumerated in the Constitution, and that no power was conferred except by express delegation. Soon afterwards, finding this construction to be too stringent and contracted, it was so modified as to uphold the exercise of powers by the general government when they resulted by clear implication: 21 Penn., 147-160; 25 Barb., 359-60; *Norris vs. Clymer*, 2 Barr., 285; *Dorman vs. The State*, 34 Ala., 216; Calhoun's Works, vol. 6, p. 224, *et seq*; 1 Wheat, 304, 324; 11 McLean, 337; 12 Peters, 657, 729, 3 Cranch, 358; 3 Dallas, 386; 11 Peters, 257; 3 Wall., 713.

The country grew apace, and with its change of growth came new ideas and new interests that seemed hampered and shackled by these earlier constructions. The States' Rights theory of a strict construction of the Constitution grew weaker as year by year brought strength to the party that advocated measures consistent only with a liberal construction. A stronger union, more central power, and a judicial acknowledgement of more powers being conferred, brought on a crisis, the result of which is clearly expressed in the celebrated *Legal Tender* cases, reported in 12 Wallace's United States Reports. These cases carried the liberality of the new school to its legitimate results, and virtually overruled the opinions pronounced in the earlier days of the Republic. The judges sought to put their decision upon authority, and cited the doctrine of Chief Justice Marshall, held in several cases. But it is difficult to see the deduction from the authority cited. These cases are, beyond doubt, the key to the judicial construction now placed upon the constitution, and, while the spirit animating them was different from that which in the days of Marshall was the genius of our institutions, the student will find some ground for that opinion in the extraordinary circumstances that surrounded the Federal Government in the days when the *Legal Tender* act was passed. Those cases arose upon the constitutionality of that act, and in the argument of the cause by Hon. Clarkson

Nott Ratter, every ground of objection was urged. He, however, mainly argued upon the extent of the power conferred upon Congress under the clause empowering that body to "coin money, and regulate the value thereof." He certainly was correct in so far as he urged that the term "coin money" applied to specie, since it would be giving it a new meaning never before entertained to apply it to the issuance of paper credits. Words must be taken in their usually accepted standard signification: 9 Wheat, 1, 187. But the court put the opinion in favor of the constitutionality upon another ground, that of self preservation. The justices go on to enumerate various facts, and the dangers that made the passage of this bill absolutely necessary to the maintainance of the Union, and, hence, it came then within the clear implication of a power of self preservation. It is clear to the student that there is but one step from this doctrine to the maintainance of any measure subversive of the separate existence of States, and the establishment of a thoroughly centralized government. But while this is true, as law students we need neither question its correctness, nor denounce those who do. Our enquiry is satisfied by the old maxim, "*Ita lex scripta est.*"

A careful student will quickly see that these constructions have been going through a series of restless steps continuously deviating from the original idea.

It has been held in Alabama that the State Constitution, unlike that of the Federal Union, is a delegation of all powers not expressly withheld; the marked difference being that in the latter case the enumeration of powers is of those delegated; in the State Constitution it is of those reserved: *Dorman vs. The State*, 34 Ala., 216; Calhoun's Works, vol. 6, p. 220, *et seq.* Or, more correctly, a State Constitution is an instrument of restraint and limitation upon powers already plenary, so far as it respects the functions of government and the objects of legislation: 42 Ala., 83; 24 Ala., 91; 1 Ala., 612.

Under our complex system of government, the State and Federal power sometimes come in conflict, and since, in that event, to enforce both at the same time, is impossible, one must succumb to the other. Powers, however, which are delegated to the Federal Government may be exercised by the States when such delegation is no exclusive; but in the event of a collision in the exercise of such power by the Federal Government and a State, the law of Congress prevails, and the State law ceases to operate, but only so far as the collision extends: *Dorman vs. The State*, 34 Ala., 216.

I would urge upon the zealous student a thorough investigation of these fundamental questions, as they are the most potent weapon in the lawyer's hands, and occupy a large space as the ground-work of all thorough legal knowledge. If the student would be a lawyer in the full sense of the term, he must familiarize himself with constitutional law, and construction generally. When the human mind has nothing arising from the habits of the country, the peculiar circumstances that surround and dangers that threaten, when it can draw no light from the living history around, it would grope its way and hesitate between two constructions, when, perhaps, a thorough knowledge of the presumptions would pour a flood of light upon it.

3. In putting statutes into operation, the end to be obtained is the prevention of that wrong, or class of wrongs, covered by that statute. Many questions then arise. The primary purpose of construing a statute is to find the end it seeks to attain, and then the mode in which that end is reached. Sir William Blackstone lays down some fine rules for the construction of statute law, which I will quote:

1. "There are three points to be considered in the construction of a remedial statute, the old law, the mischief, and the remedy."

It would be well to remember, in connection with this rule, that statutes in derogation of the common law, must be strictly construed.

2. "A statute which treats of things, or persons of an inferior rank, can not, by any general words, be extended to those of a superior.

3. "Penal statutes must be strictly construed.

4. "Statutes against frauds are to be liberally and beneficially expounded.

5. "One part of a statute must be so construed by another that the whole may (if possible) stand, *ut res magis valeat quam pereat*.

6. "A saving, totally repugnant to the body of the act, is void.

7. "When the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one.

8. "If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived without any formal words for that purpose.

9. "Acts of Parliament, derogatory from the power of subsequent Parliaments, bind not."

Interpolate or substitute the words "Legislature" or "Congress" in lieu of the word "Parliament," and it becomes applicable to our institutions.

10. "Acts of legislative bodies impossible to be performed, are of no validity."

This latter rule may, in one sense, be carried further, for, if from such acts there arise collateral consequences, absurd or manifestly and glaringly contradictory of common sense, they may be regarded as void. While, now, the law books have laid down these doctrines, they are by no means clear. If the rule be taken in its fullest sense, it places the judiciary above the legislative branch of the Government, which would work subversion. Yet to a limited extent it is a humane rule to guard against the furies of an excited and unreasonable Legislature. The history of such bodies furnishes many instances of unreasonable, unjust, and savage legislation. This rule should, I think, rest to a great extent within the sound discretion of the court that expounds it. The weight of authorities seem to lead to that conclusion.

The necessity calling these rules into existence was the difficulty of arriving at the object of the Legislature in passing the act. When the wording of the statute is such that all doubt as to its purpose is banished most of those rules are inapplicable. In the case of penal statutes, however plain they may be made, they must yet be strictly construed, and remedial statutes must be so expounded as to suppress the evil and advance the remedy. But to do this, the court can not go beyond the limit of the statute, for that would be assuming legislative authority. The Legislature, by fiction, is supposed always to embody in an act all that was necessary to be done to carry out the manifest purpose of it, and should this not be true in point of fact the question is not open for the courts. They can not suppress the evil and advance the remedy if the Legislature fails to adopt appropriate measures authorizing such action. When the meaning of a statute is doubtful, the consequences may be considered, but where the meaning is plain, to regard consequences would be legislation in its nature. These rules form the legitimate and appropriate means of arriving at the intention of the Legislature, which is the ultimatum of all constructive investigation. If the wording or composition of a law make it plain, we must hold to that, but if not plain, then we resort to the rule just laid down. We can come no nearer a general rule than this. See Smith's Commentaries on Statutory and Constitutional Construction. Since it is impossible to give more than a general idea of statutory construction in this limited article, I recommend this work to the law student as one of high importance in the abstract study as well as in the practice of the law.

I can not leave this part of the subject without calling attention to one feature of construing statutes. It is with reference to their constitutionality. It is sometimes the case that an act of the Legislature is in conflict with the Constitution, either in whole or in part, that is when some part of such act, if standing alone, would be objectionable, and others standing unconnected with such objectionable part, would not conflict with the Constitution. The forms prescribed for its passage may for some purposes not have been complied with, while as to other and different purposes, every prerequisite has been gone through with. Those parts which conflict with the Constitution must, of course, be regarded as a nullity, but whether the other parts or parts, because of such association, must be held void, depends on a sound consideration of the objects of the law, and to what extent and in what manner the unconstitutional part affects the remainder. Hence the fact that a part of a statute is unconstitutional does not *ipso facto* authorize the Court to declare the whole statute void, and if the act is so framed that the objectionable part can be separated and the remainder stand, the court must uphold it. But such part must have in its objects and provisions at least a degree of appropriateness to the original object of the legislature. The objectionable part may be blended with a valid part in the same section, for the division of an act into sections is purely artificial, and subserves only the purpose of convenience. If the two are necessary counterparts of the same subject-matters one must share the fate of the other, they are then inseparable. The part that is left, after the rejection of any unconstitutional portion, must be so perfect within itself as to be capable of being executed wholly independent of the rejected part. The proper and best way to get at it is by striking out the rejected part, and if the remainder has that degree of completeness as to render it operative, then it stands valid, otherwise it too is void. When one part is connected with another as a condition or consideration, and the latter is void, the former must also fall.

A clear idea of the mode of construing acts under charge of being unconstitutional may be found in Mr. Cooley on Constitutional Limitations, a work full of sound thought and principle, and that bears the marks of long and patient investigation.

4. Another interesting, as well as important, branch of this investigation is the construction of the laws, decrees, records, &c., of other States by the courts of a given State. To Alabama courts the public acts and judgments of the State of Georgia, for example, are those of a foreign court in many of the most important features, although

the Federal Constitution brings them some nearer together in their relations than separate nationalities. Section 1 of Article 4 of that instrument says, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." The acts, records and judicial proceedings of courts strictly foreign are recognized and enforced in this State alone by virtue of comity, where no treaty or legislative regulation interposes. A judgment of a foreign court or of the *quasi* foreign courts of Georgia, is evidence of a right of a high character, upon which suit may be brought in our State courts. It is of a dignity above that of a promissory note, or sealed instrument, and below that of a strictly domestic judgment. The rule of the common law with respect to the force of foreign judgments and decrees has been, to a great extent, modified by this clause of the Federal Constitution. It would be too lengthy and tedious to go into all the presumptions at common law attaching to them, or to show how they could be impeached, set aside, and by whom. This branch would of itself take up a good sized volume, if fully elucidated. Mr. Herman, in his work on Es-toppel, with the Federal Constitution and all the most important decisions before him, says, "From the authorities and cases cited in regard to the effect of judgments of other States, the following may be deduced as the law governing them:

a—That the plea of *nul tiel* record is the only defence admissible in an action upon them in another State.

b—That they are *prima facie* evidence of jurisdiction, and when that is shown they are conclusive.

c—That their operation can not be extended beyond the limits of the jurisdiction in which they are rendered."

In the construction of contracts made in another State the common law rule of applying the *lex loci contractus* is adhered to by the State courts, and are by no means interfered with by the operation of this clause in the Federal Constitution.

A very interesting application of this doctrine is found in the numerous decisions upon the status of the Confederate States Government. *Texas vs. White*, in 7 Wallace 700, is the leading case. The substance of this decision is that the Union is, and was since the adoption of the Constitution, an indissoluble Union of indestructable States; that Texas was never out of the Union, and, hence, that acts of internal regulations necessary to maintain peace and good order, such as acts sanctioning and protecting marriages, the domestic relations, governing courses of descent, regulating the transfer and

conveyance of property, and the like, passed by the Texas legislature during the attempted connection of that State with the rebel government, must be regarded, in general, as valid, since that was an actual, though unlawful, government; that acts in aid and furtherance of the rebellion against the United States must in general be considered void. The acts of the State government of Texas during the war having reference entirely to police and internal regulations are upheld; when in aid of the rebellion they are void; and all the acts of the Confederate States government are absolutely null. It would be competent, surely, for Congress to recognize any of those acts which are within themselves not unconstitutional, by appropriate legislation, but since they were not thus recognized they rest alone upon comity which the United States does not recognize at all to this defunct power. They are therefore absolutely void.

What is there decided of Texas is the law as to all the States engaged in the rebellion for the time of its duration. But while full faith must be given to the public acts of other States the courts will not take judicial notice of their existence, and hence they must be specially pleaded and introduced if required, or rather if such introduction is not waived. If such act be not so pleaded and established the court will presume that the common law prevails in that State. For instance, if a court of the State of Alabama is called upon to construe a contract made by citizens of the State of Tennessee it should be guided by the *lex loci contractus*, or law of Tennessee in force at the time of the making of the contract, for they who made it are presumed to have arranged its terms with reference to the then existing laws of their State. Suppose that a statute of that State prevails overturning the common law, and which, bearing on the contract in question, produces quite different results from those brought about by the operation of the common law. Such act not being pleaded and proven to the Alabama court, the contract will be construed as if the common law prevailed there, or as if no such statute were in existence. The presumptions of the State courts then are that the common law prevails in every other State, and they will construe contracts made in other States by it in the absence of proof of a statutory regulation.

I presume I could not do better in closing this short article than to refer to another branch of construction, viz: The force and binding validity of different classes of law books. As to the weight that is to be given them they resolve themselves into two classes; that is, one class is authority because of the official position of the person

pronouncing the opinion; the other because only of the eminent legal knowledge of the author. To the former belong the reports of cases decided by the several courts; to the latter, the elementary works.

When one comes to consider the weight to be given to a law book or any passage in one, this division becomes of vast utility. We are before one of the courts of Alabama, and in the argument of a cause a certain question arises. If you bring a decision of the Supreme Court of this State upon that point the court would be forced to follow that ruling, for the superior exercises a general directory over the inferior courts; and when the former says this or that is law, the latter's duty is to follow without question. If you bring to substantiate your proposition not a reported decision, but an elementary work, the court may regard it (and I am not sure but that it is its duty) only as the words of one wise in the law, which has as its only recommendation the likelihood of such a man being correct. It emanates from no official source, and hence acquires consideration by force of its truth alone, unmixed with compulsion and unsustained by the strong arm of power.

An elementary work is more in the nature of a persuasive authority of the correctness of its proposition, while the decisions exclude the idea of persuasion since the tribunal that renders them has the power to command and enforce obedience. One decision by the Supreme Court before the Circuit Court is worth many elementary works on the identical point, even if they completely harmonize with each other.

Your opposing brother of the bar uses against you a decision on a given point, against which you have several elementary authorities holding to the contrary. If his authority stands yours must necessarily fall. You enquire then whether the point decided in his authority was really a question before the court, since the decision of a superior court is only binding upon an inferior when made upon a question necessary to be determined to a full and proper disposition of the cause. If the point relied upon was not necessarily involved before the court, then the decision is called *dictum*, and is binding on no inferior court more than any elementary work on the same question. As a legal proposition it is only persuasive authority since in its rendition the Judge was not the mouthpiece of the superior court, but at most only an eminent lawyer giving his opinion as to what is the law. Hence, if you can show to the inferior court that that decision on that point was *dictum*, it has no preference over ele-

mentary works, save, perhaps, that which the over-topping pre-eminence of its author may give it.

But all these rules are not to be understood as operating with a merciless and never yielding regularity, but like all other parts of a well developed mental machinery, is subject to exceptions. The circumstances of each case have much to do in determining justice where to strike her blow. Justice does not seek rigid rules that know no yielding, but with a consistent care adapts itself to the thousands of cases similar and yet different.

JAMES WYATT OATES.

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Rules Governing in Conservatory Proceedings and Appeals in Louisiana.

BONDS AND AFFIDAVITS.

In all cases of Attachment, Arrest and Sequestration, as also in Suspensive and Devolutive Appeals, the bond is made payable to the Clerk of the County issuing the process or granting the order, as the case may be; injunction bonds are excepted from this rule, and are still payable to the defendant in injunction, *ut ante*.

The amount of bond in arrests of the debtor and attachments exceeds by one-half the amount claimed, and in suspensive appeals, by one-half the amount covered by the judgment appealed from. The amount of bond in sequestrations, injunctions and devolutive appeals is not regulated by law, but is fixed by the Judge ordering the writ on granting the appeal, according to the nature and circumstances of the particular case. No bond is required in provisional seizures nor in injunctions predicated upon either of the following grounds enumerated in article 738 of the "Revised Louisiana Code of Practice:"

1. When the debtor alleges under oath that he has paid the debt for which he is sued.

2. That it has been remitted by the creditor.

3. That it has been extinguished by transaction, novation, or in some other legal manner.

4. That time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract.

- 5; That the act containing the privilege or mortgage is forged.

6. That it was obtained by fraud, violence, fear or some other unlawful means.

7. That he has a liquidated account to plead in compensation of the debt claimed.

8. And finally, that the action for the recovery of the debt is barred by prescription.

The debtor may be released from arrest by complying with either of the requirements prescribed in articles 218 and 219 of the Code of Practice, and may cause the seizures effected in attachments, sequestrations and provisional seizures to be released on conforming

with the requirements of articles 259, 279 and 289 of the Code of Practice, respectively. He may likewise cause injunctions in certain cases, when the injury alleged is not irreparable, to be dissolved on complying with the provisions of article 307 of the Code of Practice.

It suffices in all cases for the issuance of conservatory writs in the absence of the plaintiff from the Parish, that the required oath be made by his agent or attorney-at-law, to the best of his knowledge and belief. The evidence of this absence, however, should appear by the affidavit and not *aliunde*; it is a condition pre-requisite to the granting of the order on the agent's or attorney's oath that there be a *prima facie* shewing that the principal is absent. Such oaths, whether by the plaintiff, his agent or attorney, may be taken indifferently before any Judge, Justice of the Peace, or Clerk of Court: Revised Statutes, §2567. The affidavits to be made for the issuance of these writs, should rigidly conform with the respective articles of the Code severally appertaining to the same; that is to say, the attachments, when the debt is due, with Article 243; not due, with Article 244; in arrests, if debt be due, with Article 214; if not due, with Article 221; in sequestrations, with Article 275; in provisional seizure, at instance of the lessor, with Article 287, and other persons, Articles 289, 290 and 291; in injunctions, ordinarily, with Article 304, and in extraordinary cases, with Article 739.

These extraordinary auxiliary remedies which the law allows to accompany the principal demand in particular cases, are rigidly confined within the limits assigned them; the party to avail himself of them, must bring himself strictly within the pale of the law, he must take the oath prescribed and give the bond required (when the latter is necessary) in *form* and *substance*, as the law provides, and leave nothing to be supplied by inference or construction.

WILLIAM H. JACK.

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ALTERATION OF NEGOTIABLE INSTRUMENTS.

DEFINITION AND EFFECT OF ALTERATION.

§ 1. Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation.

This principle of law is essential to the integrity and sanctity of contracts; and in England it has been extended to a degree which has not found favor in the American Courts. There it has been adjudged that a deed, bill, note, guaranty, or other written executory contract is avoided by any material change in the terms thereof, although that change be made by a stranger, upon the ground that the custodian of an instrument is bound to preserve its integrity, and as it would be avoided if altered by himself, so it should be avoided, if through his negligence, it were altered by another.¹ And the like views prevail in Scotland.²

In the United States a more liberal view prevails as to the rights of the beneficiary of a written contract, and if a stranger without any complicity with him, intermeddles and changes its terms, he is deemed a spoliator, and the act is termed a *spoliation* being an infringement of the right of all parties; but it is considered more the misfortune than the fault of the holder that a third party should have trespassed on his property, and he is not, therefore, made the victim of his conduct. Therefore, the term *alteration* in this country is understood to signify a material change in the contract by a party thereto, and no *spoliation* will avoid a bill or note, (being the act of a stranger,) unless it be so great as to render the words unintelligible

¹ *Master vs. Miller*, 4 Term R., 320; 2 H. Bl., 140, where the alteration was made by a stranger. *Davidson vs. Cooper*, 11 M. & W., 778; 13 M. & W., 243.

² *Robinson's Practice* (N. ed.) 137; *Byles on Bills*, (Sharswood's ed.) top p. 472; *Murchie vs. Macfarlane*, *Thompson on Bills*, 110.

or uncertain, in which case, it is regarded as a virtual destruction of it.¹

The English doctrine that spoliation by a stranger avoided the instrument, has been characterized by Judge Story as repugnant to common sense and justice, and deserving no better name than a technical.²

§ 2. It was insisted at one time that the avoidance by alterations applied only to deeds, because of their solemn character, but where the date of a bill was altered by the payee, another indorsed by him to a holder for value without notice, it was held that he could not recover, and it was well said by Ashurst:³ "There is no magic in parchment or wax, and the principle to be extracted from the cases is that any alteration avoids the contract." And such are the constant and essential uses to which negotiable instruments are put, that it has been considered that more dangerous consequences would flow from a leniency toward alterations in bills and notes, than in deeds.⁴

§ 3. The alteration may consist in changing its (1) date, or the (2) time or (3) place of payment, or the (4) amount of principal or (5) interest to be paid, or the (6) medium or currency in which payment is to be made, or (7) the number or the relations of the parties, or in (8) the character and effect of the instrument as matter of obligation or evidence.

And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for another, or by obliterating or subtracting from it some provision incorporated in it.

It will be no answer to a plea of alteration that its operation is favorable to the parties effected by it, whether in lessening the amount to be paid, enlarging the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases when varied to be that others act, and sufficient for him to say, "*Non haec in fœdera veni.*" It may be questioned whether or not prolongation of time, decrease of

¹ *Piersol vs. Grimes*, 30 Indiana, 129, (1868); *Crockett vs. Thomason*, 5 Sneed, 342; *Bigelow vs. Stephen*, 35 Vt., 521; *Terry vs. Hazlewood*, 1 Duvall, 101; *Lubbering vs. Kohlbrecher*, 22 Missouri, 596; *Medlin vs. Platte, & Co.*, 8 *Id.* 235; *Ford vs. Ford*, 17 Pick., 418; *Lee vs. Alexander*, 9 B. Monroe, 25; *Waring vs. Smyth*, 2 Barb. Ch. R. 119; *Davis vs. Carlisle*, 5 Alabama, 707.

² *United States vs. Spalding*, 2 Mason, 478.

³ *Master vs. Miller*, 4 Term. R., 320; 2 H. Bl., 140.

⁴ *U. S. Bank vs. Russell*, 3 Yeates, 391.

amount, or other apparently beneficial alteration, is really so. A debtor may make provision for payment on one day, and not be ready on another. A decrease of the amount destroys the identity, and confuses the traces of his obligation, and every reason of policy and principle forbid that the laws should tolerate tampering with the right and engagements of others.

Alteration of Date.

§ 4. In the *first place*, as to the DATE of the bill or note, it is obviously a most material part of it, indicating the time it became a subsisting contract, and the time when the contract is to be performed in many cases, and a thousand circumstances may arise adding additional consequence to the question when the instrument was issued.

Therefore, any change in the date imparts a new legal effect and operation to it, and is a material alteration which avoids it as against prior parties even in the hands of a *bona fide* holder without notice.¹

It matters not that the time of payment, by relation to the date, may be prolonged, for suffice it to say it was not the time agreed on. Thus, in a case before the United States Supreme Court, where the maker of the note, drawn payable one year from date, changed "September 11," to "October 11," before delivery without consent of his surety, it was held that the note was avoided as to him.²

The alteration may be in the year,³ or the month,⁴ or the day of the month,⁵ or in all three.⁶

Even where a note was altered in date to one day previous, and the effect *as to its time of maturity* remained unchanged, because of the circumstance that originally it would have fallen due as its

¹ *Master vs. Miller*, 4 Term R., 320; 2 H. Bl., 140; *Owings vs. Arnot*, 33 Miss., 406 *Britton vs. Dierker*.

² *Wood vs. Steele*, 6 Wallace, 80, (1867). Swayne, Judge, saying: "The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed, another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that *it is not his deed*, and if it be not under seal that he did not so promise. In either case, the issue must necessarily be found for him. To prevent such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged."

³ *Russel vs. McNab*, Scotch case, *Thompson on Bills*, 111.

⁴ *Jacob vs. Hart*, 2 Starkee, 45.

⁵ *Outhwaite vs. Luntly*, 4 Camp., 179; *Master vs. Miller*, 4 T. R., 320, *see supra*.

⁶ *Walton vs. Hastings*, 4 Camp., 223.

face imported, on Sunday, and therefore would have been legally due on Saturday, and by the change of date it fell due on Saturday, so that in point of fact, Saturday in either case was its day of payment. It was held, that it was avoided by the alteration.¹ And the decision seems clearly right. The maker appeared to be bound as of a day prior to his binding himself. The identity of his contract was destroyed; and its legal effect changed. Questions of his own, and of others solvency, might arise making a day material. His memory and his memoranda might be challenged, or contradicted. And then although no actual injury might result, the inflexibility of the principle is essential to prevent its possibility.

It has been held, that the date of an indorsement on assignment is not a material part of it; and that an alteration of it will not vitiate the holder's title to the whole amount;² but the date may be very material when the question arises whether or not the indorsement was made before or after maturity, and this doctrine does not seem to us maintainable.

Alteration in time of Payment.

§ 5. In the *second place* as to the time of payment, specified or implied in the bill or note, a change of such time is obviously of the same nature as a change in the date—identical in principle and effect; and whether such change delays, accelerates, or preserves in legal effect the time specified or implied for payment, it constitutes a material alteration.³ Thus, if the bill be payable on demand, and is altered to read one day after date, it is materially varied;⁴ so a substitution of "*after date*" for "*after sight*";⁵ or the date of day, or month, or year, effects the same result.⁶ And where a party gave authority to another to draw a bill upon him at "*ninety days from the 10th of April,*" on alteration to the "*16th of April,*" unauthorized by him, was held to discharge his liability as acceptor under the authority, although the time of payment was extended six days.⁷

¹Stephens vs. Graham, 7 Sergt. & R., 505.

²Griffith vs. Cox, 1 Tenn., 210.

³Miller vs. Gilleland, 19 Penn. St., 119; Lesler vs. Rogers, 18 B. Monroe, 523; Outhwaite vs. Luntley, 4 Camp, 179; Bathe vs. Taylor, 15 East., 412.

⁴Murdoch vs. Lee, 4 Pat. Ap. Ca., 261 (Scotch case); Thompson on Bills, 111, the object being, as the annotator observes, to make the bill bear interest.

⁵Long vs. Moor, 3 Esp., 155; note Anderson vs. Langdale, 3 B. & Ad., 560.

⁶Thompson on Bills (Wilson's ed.), 111; Lewis vs. Kramer, 3 Md., 265.

⁷Lewis vs. Kramer, 3 Md., 265.

Alteration in the Place of Payment.

§ 6. In the *third* place, as to PLACE of payment, when the bill or note has been drawn payable at a particular place, the obliteration of such place so as to make it payable generally constitutes a material alteration as against all parties not consenting;¹ and likewise where no place is designated, it is a material alteration to insert one.² And *a fortiori* it is a material alteration to obliterate one place and insert another. Thus, where the drawer of a bill after acceptance and without acceptor's consent, wrote after the acceptance "*payable at Mr. B.'s, Chiswell street,*" it was held a material alteration, and the acceptor discharged,³ though in England it was formerly held otherwise.⁴ So, striking out "*in London,*" and thus making the bill payable generally.⁵ Even a *bona fide* holder can not recover upon an acceptance so altered,⁶ nor upon a note so altered against parties prior to the one making the alteration;⁷ changing the place of date would change the rights of the parties, and hence bears alteration.⁸

§ 7. In England and in many of the United States, it is provided by statute that acceptances of bills drawn payable at a banking house, or other particular place, shall be deemed general acceptances, unless the drawer adds special words limiting the payment to a particular place. The effect of these statutory provisions is that it is not necessary to aver or prove presentment at such place in an action against the acceptor, who, however, may show any loss resulting from non-presentment there. But an indorser is absolutely discharged by failure to make due presentment there.⁹

These provisions do not affect the rules applying to alterations. The acceptor has a right to deposit the amount at the particular place designated; and that done his obligation is discharged. Therefore, the insertion of a particular place would materially vary his rights. Besides, as said by Abbott, C. J.: "Suppose a bill so altered

¹McCurbin *vs.* Turnbull (Scotch case), Thompson on Bills, 112.

²Chitty on Bills (13th Am. ed.), top p. 209-211, 183, 184.

³Tidmarsh *vs.* Grover, 1 Maule & S., 735.

⁴Cowie *vs.* Halsall, 4 B. & Ald., 197 (E. C. L. R.); 3 Stark, 36; see also, Tidmarsh *vs.* Grover, 1 Maule & S., 735; Rex *vs.* Treble, 2 Taunt., 328.

⁵Trapp *vs.* Spearman, 3 Esp., 57, in which case the insertion on a bill "*when due at the Crosskeys, Blackfriar's Road,*" was held immaterial. See also, Marson *vs.* Petit, 1 Camp., 82.

⁶Burchfield *vs.* Moore, 25 Law & Eq., 123; 5 El. & B., 683.

⁷Nazro *vs.* Fuller, 24 Wend., 374.

⁸Mahaiwe Bank *vs.* Douglass, 31 Conn., 170.

⁹See 1 and 2 Ga., 4th ch., 78.

to be indorsed to a person ignorant of the alteration; his right to sue his indorser would, as the bill appears, be complete, upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the acceptor is, in consequence, discharged."¹

§ 8. Whether a memorandum of the place of payment is to be considered as a part of the contract, or merely as a direction where payment will be made has been questioned; but it seems now settled that it enters into the contract and is a material alteration.

In *Bank of America vs. Woodworth*, 18 Johns., 315, it appeared that an accommodation note had been made, dated and indorsed in blank at Albany, where the parties resided, and that the maker without the indorser's knowledge or consent wrote in the margin, "payable at the Bank of America," *i. e.*, in New York City. The Supreme Court held the alteration immaterial, on the ground that an indorser in blank leaves the place of payment, when none is designated, to the subsequent discretion of the maker, except only when he appoints one in bad faith, or at an unreasonable distance.

But this decision was overruled on appeal, (*Woodworth vs. Bank of America*, 19 Johns., 391), the Court ruling that a written instrument might be varied by a memorandum in the margin, and that the terms of such memorandum had the same effect as if contained in the body of the instrument;² and that this was a material alteration, because "it subjected the indorser to new and unexpected liabilities. By the note, as originally drawn, he bound himself to pay in the event of non-payment on a demand being made of the maker personally, or at his residence, by the addition of the *memorandum*, he is made liable upon a demand of payment at *New York*, which, but for that *memorandum* would have been perfectly nugatory. It rendered valid a notice of non payment, which was received one or two days later than that which he contemplated at the time of his indorsement, a circumstances by which he does not indeed appear to have been injured, but which certainly increased his risks, and lessened his prospects of indemnity.

¹*McIntosh vs. Haydon*, Ry. & M., 362; *Desbrowe vs. Weatherby*, 1 M. & Rob., 438; *Cowie vs. Halsall*, 4 B. & Ald., 497; *Taylor vs. Moseley*, 1 M. & Rob., 439, n.; *Gardner vs. Walsh*, 5 El. & B., 83; *Burchfield vs. Moore*, 5 El. & B., 683; *Bank of America vs. Woodworth*, 19 Johns., 391; *Oakey vs. Wilcox*, 3 How. Miss., 330; *White vs. Haas*, 32 Ala., 430.

²*Starr vs. Metcalf*, 4 Camp., 217; *Trecothick vs. Edwin*, 1 Starkie's R., 469; *Platt vs. Smith*, 14 Johns., 368; *Jones vs. Failes*, 4 Mass., 244.

Alteration in Amount of Principal and Interest.

§ 9. In the *fourth* place, as to the amount of principal for which the bill or note is executed, any change thereof is a material alteration, whether it be increased¹ or lessened,² for it is a palpable variance of the instrument's legal effect in its most vital part. Indeed, an alteration to a larger amount is a forgery; and so also of a smaller amount, if with fraudulent intent.

It has been held that where the principal altered a note so that its amount was lessened, and then delivered it to the payee, the surety was not discharged.³ Certainly the identity of the contract was destroyed, and it is difficult to reconcile this case with the principles and authorities already stated. Doubtless, the idea that it was a release, and therefore a benefit to the surety, *pro tanto*, had a weighty influence with the Court; but the law denominates any change in the legal effect of a contract an alteration, and its policy is to tolerate no tampering with written instruments.

§ 10. In the *fifth* place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the per centage of interest, is of the same character as if it changed the principal. Where "*with lawful interest*" were written on the corner of the note;⁴ where "*with interest from date*" were incorporated in it;⁵ and where "*with interest*" were written by the maker after it had been indorsed, but before delivery to the payee, it was alike held to be material, and to avoid the note as against non-consenting parties;⁶ where "*with interest payable semi-annually*" were inserted before delivery to payee;⁷ and where they were inserted afterwards,⁸ the surety was discharged; and where "*with interest*" was added, but without fraudulent intent,⁹ and "*interest to be paid annually.*"¹⁰ So, adding "*eight per cent. interest;*"¹¹ or "*bearing ten per cent. interest from maturity.*"¹² A change of per centage is of like effect. Thus, where "*nine per*

¹Bank of Commerce vs. Union Bank, 3 Comstock, 230; Goodman vs. Eastman, 4 N. H., 455.

²Stevens vs. Graham, 7 Sergt. & R., 505; Leith vs. Elphiston, Scotch case, Thomson on Bills, (Wilson's ed.) 111. ³Ogle vs. Graham, 2 Penn., 132.

⁴Warrington vs. Early, 2. El. & Bl., 763; see also Sutton vs. Toomer, 7 B. & C., 416.

⁵Brown vs. Jones, 3 Porter, Ala., 420.

⁶Waterman vs. Vose, 43 Maine, 504.

⁷Neff vs. Homer, 63 Penn., St., 327.

⁸Dewey vs. Reed, 40 Barbour, 16.

⁹Fay vs. Smith, 1 Allen, 477.

¹⁰Boalt vs. Brown, 13 Ohio, N. S., 364.

¹¹Hart vs. Clouser, 30 Ind., 210.

¹²Le vs. Starbird, 55 Maine, 491.

cent." was added to the words of a note "*on demand and interest*,"¹ and where twelve per cent. was changed to ten.²

So interlining the word "*paid*" before "*annually*" in the expression: "*the above to be at ten per cent. annually.*"³

Alteration in Medium of Payment.

§ 10. In the *sixth* place, as to the *medium* of payment, a change of the kind of currency as by the addition of the words, "*in specie*" to a bond after the sum;⁴ or of the denomination, as, "from pounds into dollars; from sterling pounds into current pounds,"⁵ even though it could do no possible injury, would avoid the instrument, and there might be cases in which positive or possible injury would result. So, if the instrument be payable in goods, on the same principle, if the style or character of the goods were changed, it would be vitiated. It was so held where a note was payable "*in merchantable neat stock*," and the word "*young*" was interpolated after merchantable;⁶ so adding "*good*," "*hard*" before "*wood*;"⁷ so writing "*good*" before "*merchantable wool*."⁸

Alteration in Respect to the Parties to the Instrument.

§ 12. In the *seventh* place, as to the PARTIES to a bill or note, any change in the *personality*, *number*, or *relations* of the parties, is a material alteration. Thus, where C., member of the firm of C. & Co., obtained an accommodation indorsement to his individual note, and then added "& Co." to his signature, thus making it his firm's note, it was held a material alteration.⁹ When there are several makers or co-sureties, the addition of another maker¹⁰ or co-surety¹¹ constitutes a material alteration; for the addition of another maker destroys the integrity of the original contract; and the addition of another surety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others. And the erasure of the name of one of two drawers or makers,¹² or payees,¹³ who have

¹Ivory vs. Michael, 33 Miss., 398.

²Whitmer vs. Frye, 10 Mo., 348 (a bond.)

³Patterson vs. McNeely, 16 Ohio St., 348.

⁴Darwin vs. Rippey, 63 N. C., 318.

⁵Stevens vs. Graham, 7 Sergt. & R., 505.

⁶Martendale vs. Follet, 1 N. H., 95.

⁷Schwalm vs. McIntyre, 17 Wis., 232.

⁸State vs. Celley, quoted in 1 N. H., 97.

⁹Haskell vs. Champion, 30 Miss., 136.

¹⁰Gardner vs. Welsh, 5 El. & B., 82; overruling Catton vs. Simpson, 8 Ad. & El., 136; see Gould vs. Coombs, 1 C. B., 543; 2 Parsons' N. & B., 556-7.

¹¹McVean vs. Scott, 46 Barbour, 379.

¹²Mason vs. Bradley, 11 M. & W., 590; Gillett vs. Sweat, 1 Gilman, 475; Callandar vs. Kirkpatrick, Scotch case, Thomson on Bills, (Wilson's ed.) 112.

¹³Cumberland Bank vs. Hall, 1 Halsted, 215.

indorsed the paper, or of one of several co-sureties,¹ is likewise a material alteration. So the substitution of one drawer or drawee, or maker or co-maker for another, is of like effect.²

§ 13. Whether or not, when there is only one maker, the addition of another is an alteration which discharges him, is a question upon which the authorities are divided. In New York, where a note was offered in part payment of a purchase, and the seller refused to take it unless the buyer added his name under the maker's, such a signature and transfer was held to make the signer jointly and severally liable with the maker to the holder of the note, and an action was allowed against both as joint makers.³ But in a subsequent case, where the payee wrote his name under the maker's, adding to it the word "security," it was held a material alteration.⁴ There are other cases in the same State in which it is held that the addition of another name as maker, where there was but one, is not a material alteration, the additional maker being regarded as a guarantor.⁵ In Scotland it has been decided, in opposition to the English authorities, that a new acceptor had been added to the address of the bill, and had accepted without the drawer's knowledge, after delivery of the bill to the other acceptor, for whose accommodation it was drawn. "But," says Parsons, commenting on this decision, "we think the wiser rule is that which looks first to the integrity of the instrument, and secures that, though there be no actual injury nor purpose of fraud."⁶

The preservation of the integrity of the instrument is certainly a matter of prime importance; and where there are several makers and another is added, it is undoubtedly destroyed. But when a note commences, "I promise," and after being signed by the maker, another name is added, while the construction of law is that he becomes also a maker; still, it may be observed that the addition does not vary the liabilities of the original maker, nor can it in any way affect an agreement between him and other makers for contribution, there being no others with whom it could exist. There could be no motive of fraud to induce such a signature; and while consistently with the general principle laid down, it might be regarded as material altera-

¹McCramer *vs.* Thompson, 21 Iowa, 244; Hall *vs.* McHenry, 19 *Id.*, 521.

²Davis *vs.* Coleman, 7 Iredell, 424; Mahaiwe Bank *vs.* Douglas, 31, Conn., 170; State *vs.* Polk, 7 Blackford, 27; Richmond Manf. Co. *vs.* Davis, *Id.*, 412; Smith *vs.* Weld, 2 Barr., 54; Fleming *vs.* Thomson on Bills, 112.

³Partridge *vs.* Colby, 19 Barbour, 248. ⁴Chappell *vs.* Spencer, 23 Barbour, 584.

⁵Brownell *vs.* Winnie, 29 N. Y., 400; McCaughey *vs.* Smith, 27 N. Y., 39, Balcom, J., dissenting.

⁶2 Parsons' N. & B., 559.

tion, because impairing the original form of the maker's contract ostensibly, the admission of evidence to explain the circumstances, and the exception of such a case from the ordinary rule would seem to be a reasonable relaxation to effectuate the ends of justice.

§ 14. A change of the personality of the party is material. Thus adding or erasing "*junior*," in the signature,¹ or changing the christian name from "*William*" to "*Thomas*."²

Alterations in the name, number or relation of the acceptors, or indorsers, stand on same footing as of other parties. Changing an indorser's christian name,³ or adding,⁴ or erasing⁵ that of an acceptor.

The interlining of the words "jointly and severally," or "severally," or "or either of us" in a note joint and *not several*, would be a material alteration, as they would engraft upon the joint a several obligation.⁶ But where a joint note has the effect to bind the parties jointly and severally, the insertion of those words would be immaterial, because merely expressing what was already implied.⁷

And the changing of a note from "*I promise*" to "*we promise*" is material because it changes a joint and several note into one joint only.⁸

Where the name of a surety was erased by agreement between himself and the payee it was held that the principal was not affected as the payee had a right to release the surety if he chose to; and therefore it was no alteration.⁹

The striking out the names of an indorsee on a special or full indorsement¹⁰; or changing a blank indorsement as to read "pay to the order of E. S. at the rate of 25 fr. 75c. per £1, '*utretro*,' &c.; and writing the same on the face of the bill,¹¹ materially alters the indorser's contract, and the latter also the acceptors.

¹Broughton vs. Fuller, 9 Vermont, 373.

²Macara vs. Watson, Scotch case, Thomson on Bills, 112.

³Macara vs. Watson, *supra*.

⁴Howe vs. Purves, Scotch case, Thomson on Bills, 112.

⁵M'Ewen vs. Gordon, Thomson on Bills, 112.

⁶Perring vs. Hone, 2 Car. & P., 401; 4 Bing., 28.

⁷Gordon vs. Sutherland, Thomson on Bills (Wilson's Ed.), 113; Miller vs. Reed, 27 Penn. St., 244.

⁸Humphreys vs. Gillam, 13 N. H., 385; Hemmenway vs. Stone, 7 Mass., 58; Clark vs. Blackstock, Holt N. P., 474.

⁹Broughton vs. West, 8 Georgia, 248; Huntington vs. Finch, 3 Ohio State, 445.

¹⁰Grimes vs. Piersol, 25 Ind., 246.

¹¹Hirschfield vs. Smith, Law Rep., 1 C. P., 340.

Writing a waiver of demand, protest or notice over an indorsement would convert a contingent into an absolute liability, and therefore discharge the indorser.¹

Alteration in the Operation of the Instrument.

§ 15. In the *eighth* place, a change in the character or effect of the instrument, whether in respect to its obligation, or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond, against which no plea of want of consideration can be made; and thus invests this contract with attributes which he declined to impart to it.² Consequently the note is avoided.

So when a seal is added to the name of one of several co-makers of a note, all are discharged because the holder could not have the same recourse against the three which he held before; one would be estopped from denying a want of consideration which might enure to the benefit of all, and new relations and obligations would be created.³

§ 16 Many questions have arisen as to the effect of adding to a note after its delivery the names of parties purporting to be witnesses to its execution. In States where a distinction is made between witnessed and unwitnessed notes, whether by the statute of limitations or otherwise, it would seem to us clear that the subscription of his name by the witness after the delivery would be a material alteration as to all parties not consenting, because it would change the legal effect of the instrument.⁴ Thus, where an unattested note was barred by six years, and one attested stood on the foot of a bond, not being barred until twenty, and ten years after its execution, being four after the bar had accrued, the attestation was added; it was held a material alteration, as "it at once infused life into an instrument which had lost all legal efficacy."⁵

So too, we should say, that if the payee should procure a person not present at the time of execution of the instrument, to sign his name as a subscribing witness, it would be *prima facie* evidence of some fraudulent design; and would in itself constitute a material alteration.⁶

¹ Farmer vs. Rand, 14 Maine, 225.

² United States vs. Linn, 1 Howard, 104; Marshall vs. Gougler, 10 Sergt. & R., 164

³ Biery vs. Haines, 5 Whart., 563.

⁴ Eddy vs. Bond, 19 Maine, 461.

⁵ Brackett vs. Mennfort, 11 Maine, 115.

⁶ Homer vs. Wallis, 11 Mass., 309; See 2 Parsons, N. & B., 555.

If, however, a party actually witnessed the execution of a bill or note, and afterwards, by request of the holder, should without other's consent, subscribe his name as witness, it has been held, that it does not work a material alteration, as it can work no harm.¹ And the suggestion that the appearance of such attestation might weigh with the jury in a question as to the genuineness of the signatures, has been thought of little force.²

But it is treading on dangerous, and at least doubtful, ground to countenance this doctrine. It is true that where proved to have been done honestly throughout, little, if any, harm could be wrought; but if permitted at all, it is by no means clear that by forging the names of promisors and of witnesses, the door might be opened for extensive frauds. Upon the minds of a jury the more solemn the form of an instrument the greater its weight. Indeed, every mark of authenticity must insensibly or otherwise have its effect upon all minds. Certainly a court should exact very rigid proof of perfect good faith; and we are sustained by high authority in the opinion which our mind has reached that it would be better not to permit such liberties to be taken with the rights of others.³ Where the name had been accidentally neglected, so that its addition was really in pursuance of an original understanding, it would be different.⁴ And very slight circumstances might prove such understanding.

It has been held that where the payee of a note cut off the name of the attesting witness, he can not recover at law, because it might be that this would impede the proof of consideration should a defense be made; and that equity would not relieve him, as it presumed everything against a spoliator.⁵ The converse doctrine would seem to us applicable when the name had been added.

§ 17. It has been held that if a bill be expressed generally "*for value received,*" and words are added describing such consideration as "*for the good will and lease in trade*"⁶ of a certain person, or "*for a certain tract of land,*"⁷ it is materially altered and avoided. The reasons assigned are, *first*, that it makes the note a confession in evidence of a fact which might otherwise require extraneous proof; and *second*, that it puts the holder upon inquiry whether that consideration passed.⁸ The first reason seems to us in itself sufficient. But

¹ Rollins vs. Bartlett, 20 Maine, 319; 2 Parsons N. & B., 555.

² 2 Parsons N. & B., 554. ³ 2 Parsons N. & B., 556. ⁴ Smith vs. Dunham, 8 Pick., 246.

⁵ Sharpe vs. Bagwell, 1 Dev. Eq., 115.

⁶ Knill vs. Williams, 10 East, 413.

⁷ Low vs. Argrove, 30 Ga., 129.

⁸ 2 Parsons, N. & B., 562.

the second is, at least, according to several cases, and as it seems to us upon principle incorrect in its statement of fact. The statement of the specific consideration is an assurance of *some* consideration, and does not charge the holder with inquiring about it.¹

§ 18. The addition of the negotiable words, "*or order*," or "*bearer*," is not an alteration when they were intended to have been inserted, and were accidentally left out.² But where the effect of such addition is to impart negotiability to an instrument not designed to be negotiable, it is a most material alteration in the nature of the contract, and the bill or note is thereby avoided.³ So the interlineation of "*or bearer*" in a negotiable note, payable to a certain person. *or order* is an alteration of it; because it materially changes the manner of its negotiability. It would not without the payee's indorsement be evidence of the amount paid to him upon being returned after payment; and it might possibly deprive the defendant of a set-off otherwise available.⁴ The substitution of "*or order*" for "*bearer*" would be different, because it would only affect the transfer of title between holder and transferee.⁵

So the addition of the words, "*without defalcation or set-off*," where they have the effect they import would constitute an alteration.⁶

§ 19. *Prima facie*, as a general rule, words on the back of a bill or note are not regarded as a part of it; and therefore the cancellation of an indorsement of part payment need not be explained unless called in question.⁷ But still an indorsement on the back of the bill or note might be material as a part of it, as its construction is to be gathered from every source of information which an inspection of it supplies.⁸ And it may be shown by evidence that an indorsement annexing a condition to the payment was in the instrument when delivered, in which case it would be deemed a material part of it.⁹

¹Hereth vs. Merchants' National Bank, 34 Ind., 380; Bank of Commerce vs. Barrett, 38 Ga., 126.

²Kershaw vs. Cox, 3 Esp., 246; 10 East, 437; Byrom vs. Thompson, 11 Ad. & El., 31; See Cariss vs. Tattersall, 2 Man. & G., 890.

³Bruce vs. Westcott, 3 Barbour, 374; Johnson vs. Bank U. S., 2 B. Monroe, 310; Pepon vs. Stagg, 1 Nott & McC., 102; Edwards on Bills, 95.

⁴Scott vs. Walker, Dudley, Geo., 243.

⁵Flint vs. Craig, 59 Barbour, 330.

⁶Davis vs. Carlisle, 6 Ala., 707.

⁷Commonwealth vs. Ward, 2 Mass., 397. See Warner vs. Spencer, 7 J. J. Marshall, 340.

⁸See Muldron vs. Caldwell, 7 Mo., 587; 2 Parsons N. & JB., 545.

⁹Blake vs. Coleman, 22 Wis., 415.

Alteration by Making or Obliterating Memoranda on Bills and Notes.

§ 20. An alteration of the legal import and operation of a bill or note may be effected as readily by making, or obliterating material memorandum upon it; as by inserting or erasing provisions in the body of it. Thus, where the words, "*with lawful interest*" were written on the corner of a note after its execution, it was said in England by the Court of Queen's Bench: "This forms part of the contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded." So where the maker of a note payable generally, wrote on the margin, "payable at Bank of North America," it was held vitiated as to the indorser.²

Cutting off or obliterating a material memorandum which had the effect to make a note written on demand payable on time;³ or which annexed a condition to the payment of the note;⁴ or provided for a delay of collection until a certain person should take it up, the maker having paid it.⁵

Immaterial Changes, and Memoranda.

§ 21. Not every change in a bill or note amounts to an alteration. If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words which the law would imply, or by striking out words of no legal significance. Thus, writing out the name of the bank after the name of the signature "cashier" which was intended to bind the bank is merely expressing more clearly the legal effect of the signature, and is not an alteration.⁶ So the insertion of a dollar mark before the numerals expressing the amount in dollars;⁷ the addition in full of the christian names of the drawers whose surnames had been affixed before acceptance;⁸ the interlineation of the sur-

¹Warrington vs. Early, 2 El. & Bl.

²Woodworth vs. Bank of America, 19 Johns, 381.

³Whelock vs. Freeman, 13 Pick, 165.

⁴Wart vs. Pomeroy, 20 Mich., 425. But query, if there was no disfigurement
See post.

⁵Johnson vs. Heagan, 23 Maine, 329.

⁶Bank of Genesee vs. Patchin Bank, 3 Kernan, 309; Folger vs. Chase, 18 Pick, 63

⁷Houghton vs. Francis, 29 Illinois, 244,

⁸Blair vs. Bank of Tennessee, 11 Humph., 84.

names of the payee, after delivery ;¹ the running of a pen through the words, "*Providence Steam-Pipe Co.*," which was one name under which a firm did business, and writing over it their style in the co-partner's names,² were likewise adjudged immaterial. So also where a bill was addressed to a firm by the style of "*A., B. & Co.*," and on being accepted by them in the name of "*A. & B.*," and the address was changed to conform to the acceptance, there being no question as to the identical firm intended, and the acceptors being liable either way.³

So erasing "*R.*" where the payee's name was written "*B. R. C.*," instead of "*B. C.*," as intended,⁴ and correcting "*Franklin E.*" so as to read "*Francis.*"⁵

And in no case is a change in the phraseology of the instrument material when it does not essentially change its legal effect.⁶

Immaterial memoranda on the margin or other portions of the bill or note stand on the same footing as immaterial insertions incorporated in it. If they be merely explanatory of some circumstance connected with the transaction they are immaterial. Thus, where a drawer who held a bill indorsed in blank by the payees, wrote under his signature: "*Left with Mr. B., (the plaintiff,) as collateral,*" it was held immaterial.⁷ So where a party's residence was noted on the instrument after his name.⁸ So an indication, for the convenience of the holder, where he would find his money when due.⁹

§ 22. So there are some changes of a purely immaterial character which do not change the effect, or impair the identity of the instrument, and therefore are not alterations. Thus, retracing a faded name in clear ink ;¹⁰ or writing over in ink a word written in pencil ;¹¹ or correcting a misspelling.¹² And where the number of a negotiable bond was changed, but it did not appear that the numbering was required by statute, nor in any way affected the holder's rights, it was held immaterial.¹³

Changes by Express or Implied Consent.

§ 23. It is quite obvious that where all the parties to a bill or note expressly agree to a change in any of its terms, that they cannot

¹Manchet vs. Cason, 1 Brev., 307. ²Arnold vs. Jones, 2 R. I., 345.

³Farquhar vs. Southey, Moody & M., 14. ⁴Cole vs. Hills, 44 N. H., 227.

⁵Desby vs. Thrall, 44 Vt., 414. ⁶Holland vs. Hatch, 15 Ohio St., 464.

⁷Bachellor vs. Priest, 12 Pick, 399; Thomson on Bills, 113.

⁸Struthers vs. Kendall, 5 Wright, 214. ⁹Walter vs. Cubley, 2 Cr. & M., 151.

¹⁰Dunn vs. Clements, 7 Jones (Law), 58. ¹¹Reed vs. Roark, 14 Texas, 329.

¹²Leonard vs. Wilson, 2 Crump & M., 589.

¹³Commonwealth vs. Emigrant & Bank, 98 Mass., 12.

complain of such change as an alteration. They have as much right to change as to make a contract. And where all do not consent, those consenting are bound, while the rest are discharged.¹

Consent may be given before the change is made, or it may be given afterwards by ratification.² It may be express, or it may be implied from custom,³ or from the acts of the parties.⁴

In all cases where a change has been made, it will be a question for the court to determine whether or not it amounts to an alteration;⁵ but the question whether or not the parties effected, consented to it, is solely with the jury.⁶

If a note be altered by one signer without the consent of the other, and be sued upon as their joint note, the plaintiff may recover against the signer who made the alteration, but the other will be entitled to his costs.⁷

Under the English Stamp Acts there are a number of decisions to the effect that no change can be made after issue even by consent of all parties.⁸ As soon as the instrument is issued the stamp has filled its function. Any change afterwards is virtually a new contract requiring a new stamp.

Consent might be inferred to the insertion of negotiable words where the party indorsed the note as if it were negotiable,⁹ so also from a subsequent acknowledgment of validity by payment of interest, consent would be implied.¹⁰ So a promise to pay after full knowledge of alteration, and an offer to give security for payment, would be competent evidence of consent.¹¹

So the supplying of an omission, such as stating on whose account the bill was drawn, there being no dispute as to the fact.¹²

Where the last indorser of an accommodation bill made a memorandum at the foot directing its proceeds to be credited to the

¹ *Grimstead vs. Briggs*, 4 Iowa, 559; *Wilson vs. Jamieson*, 7 Barr, 126.

² *Cariss vs. Tattersall*, 2 Man. & G., 890; *Morrison vs. Smith*, 13 Missouri, 234.

³ *Woodworth vs. Bank of A.*, 19 Johns., 391.

⁴ *Clute vs. Small*, 17 Wendell, 238; *Bowers vs. Jewell*, 2 N. H., 543.

⁵ *Stevens vs. Graham*, 7 S. & R., 505; *Bowers vs. Jewell*, 2 N. H., 543; *Jones vs. Ireland*, 4 Iowa, 63.

⁶ *Stout vs. Cloud*, 5 Littell, 205; *Stahl vs. Berger*, 10 Sergt. & R., 170.

⁷ *Broughton vs. Fuller*, 9 Vermont, 373.

⁸ *Bowman vs. Nichol*, 5 T. R., 547; *Bathe vs. Taylor*, 15 East, 412; *Downes vs. Richardson*, 5 B. & Ald., 674.

⁹ *Kershaw vs. Cox*, 3 Esp., 246.

¹⁰ *Cariss vs. Tattersall*, 2 Man. & G., 890. ¹¹ *Humphreys vs. Guilan*, 13 N. H., 385.

¹² *Commercial Bank vs. Paton*, *Thompson on Bills*, 113.

drawer, it was held no part of the bill, and its obliteration of no consequence.¹

Changes to Correct Mistakes, Supply Omissions, and effectuate Parties' Intentions.

§ 24. In like manner, where the change is made by implied consent; as for instance where it is done in order to correct a mistake in which all the parties concurred; or to supply an accidental omission and thus to effectuate the intentions of all, it does not constitute a legal alteration. For although it may sometimes vary the apparent legal effect of the instrument, it does not change the effect which they intended to give it; but really effectuates their design by giving expression to it and prevents it from being thwarted. Thus, where 1822 was inserted by mistake for 1823, and the agent of the drawer, and acceptor to whom the bill had been given for delivery to the indorsee rectified the mistake, it was held not an alteration.² And so where 1868 was changed to 1869, the latter having been intended.³

§ 25. So, where the drawer intended to make the bill negotiable, and indorsed it over, but omitted the words, "*or order*," their subsequent insertion merely supplied his omission, and it was held, was not an alteration.⁴ So, where the holder of a bill payable "*twenty-four after date*," inserted "*months*;"⁵ and where in a bill payable "*in the of our Lord*," the word "*year*" was inserted,⁶ it was held likewise. And where a note was intended to read "*eight hundred dollars*," and "*hundred dollars*" were omitted, they were properly supplied.⁷ So, where "*hundred*" was inserted before "*pounds*" in a bond, having been intended.⁸

For like considerations, where the name of one of several payees was inserted by mistake, the indorsee of the other payees might prove the fact in a suit to recover against his indorsers, in order to show that such payee's indorsement was unnecessary to pass title to him.⁹ And we should say that, as such payee's name was not intended to be there, its erasure would be authorized to correct the mistake.¹⁰

¹ Hubbard vs. Williamson, 5 Iredell, 397.

² Brutt vs. Picard, R. & M., 273.

³ Duker vs. Franz, 7 Bush, (Ky.) 273.

⁴ Kearshaw vs. Cox, 3 Esp., 246; 10 East., 437; Jacobs vs. Hart, 2 Stark., 45.

⁵ Connor vs. Routh, 7 Howard (Miss.) 176.

⁶ Hunt vs. Adams, 6 Mass., 519.

⁷ Boyd vs. Brotherson, 10 Wendell, 93.

⁸ Waugh vs. Russell, 1 C. Marsh, 214; 5 Taunt., 707.

⁹ Pease vs. Dwight, 6 Howard, 190.

¹⁰ Thomson on Bills, (Wilson's ed.) 114.

Bona Fide Holder of Altered Bill or Note. Where Party Affords Opportunity for Alteration he is Bound.

§ 26. There is a general principle which pervades the universal law merchant respecting alterations, (which, when they are material, will, as we have seen, vitiate the bill or note even in the hands of a bona fide holder without notice); a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is, that when the drawer of the bill or the maker of the note has himself by careless execution of the instrument, left room for an alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man; he will be liable upon it to any *bona fide* holder without notice when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it.¹ The true principle applicable to such cases is that the party who puts his paper in circulation, invites the public to receive it of any one having it in possession with apparent title, and he is *estopped* to urge an actual defect in that which, through his act, ostensibly has none.² The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when that inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration. Thus, where the maker of a note left a blank between the amount, "*one hundred,*" and the word "*dollars*" following, and "*fifty*" was inserted between them in the same hand-writing, it was held that the holder without notice could receive the whole amount.³ So, where the note was expressed "*with interest monthly at the rate of — per cent. per annum, per month, until final payment,*" and the word "*five*" was inserted so as to put the blank rate of interest at five per cent.;⁴ but in a similar case,⁵ where a blank was left after the words, "*value received with interest at —*" and "*ten per cent.*" was inserted, this doctrine was denied.⁶ So, where after the word "*at*" a blank was left, and it was filled so that the note was made payable at an unauthorized place.⁷

¹Young *vs.* Grote, 4 Bing., 253; Isnard *vs.* Towes, 10 La. An., 103; Garrard *vs.* Hadden, 67 Penn., St., 82; Thomson on Bills, (Wilson's ed.) 109; also 42-3.

²Van Duzer *vs.* Howe, 21 N. Y., 538 (1860.)

³Garrard *vs.* Hadden, 67 Penn. St., 82.

⁴Vischer *vs.* Webster, 8 Calif., 109; see also 6 Calif., 577.

⁵Kitchen *vs.* Place, 41 Barbour, 465. ⁶Holmes *vs.* Trumper, 22 Mich., 427 (1871.)

⁷Harvey *vs.* Smith, 55 Ill., 224; see also Elliott *vs.* Levings, *Id.*, 214.

And in like manner, where the note was written partly in pencil and partly in ink, and the provision in pencil annexing the condition: "*This note is not to be paid until fourteen mills are sold,*" the rubbing out of the condition would not debar a *bona fide* holder without notice from recovering, the maker having been guilty of gross negligence in so making the note as to be easily altered without mutilation.

§ 27. The addition or subtraction of a memorandum on the bill or note is, as we have already seen, as much an alteration as if the same act had been committed in respect to its incorporated terms. But if the memorandum were so written upon the margin of the instrument that it could be readily separated from it without giving it a mutilated appearance; a *bona fide* holder, taking it without notice, we should consider unaffected by its being so severed and destroyed. If the memorandum were originally made upon a separate paper, there can be no doubt that, although a contract binding between the parties, it would be of no effect against a third party without notice;¹ and if the party who executes a negotiable instrument chooses to restrict its effect by a separable memorandum instead of writing the entire contract in the body of the instrument, he should not be protected against a fraud of which he has laid the foundation. The holder should be protected upon the principle that where one of two innocent persons must suffer, the loss should fall on the one who has furnished the opportunity. The case is analogous to those in which blanks have been filled with excessive amounts. The promiser should be held bound when he has left his contract in a form to be mutilated by the cutting away of a part, as well as where he has left room for an alteration to be engrafted upon it. But it has been held differently.²

¹2 Parsons' N. & B., 539.

²In *Wait vs. Pomeroy*, 20 Mich., 425, it appeared that there was written under a promissory note for \$200 this memorandum, "If the machine should not be delivered this note not to be paid," which was cut off and destroyed, and the note, without it, passed to a *bona fide* holder without notice; the Court held that he could not recover, and Campbell, C. J., concluded his opinion, saying: "There seems at first a plausibility in the argument that a party by signing a note with a separate memorandum beneath, puts it in the power of the holder to gain easier credit for the note than it would be likely to gain if altered in the body. But as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And practically it is a matter of every-day occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way. The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety except by looking to the character and responsibility of the persons

§ 28. But if the alteration were made without any fault on the part of the maker, drawer or acceptor, neither will then be bound, although the alteration were so skillfully made as to escape notice upon careful observation. Thus, where a banker's check had been dexterously altered by a chemical process, the original sum being expunged, and a larger inserted, the banker was not allowed to recover of the drawer more than the sum for which the draft actually called when he drew it.¹ And clearly when the alteration is made in so clumsy or ineffectual a manner that it ought to excite suspicion and inquiry, the holder will not be protected, having only himself to blame if he takes it.²

§ 29. In Scotland the same doctrine obtains, and there the acceptor and indorser were held bound upon a bill in which the sum had been altered from "*eight*" to "*eighty-four*" pounds; there being so much room for the alteration, that it was made without giving the bill a suspicious appearance. In another case in which two bills came under consideration—one in which the words "*four hundred and*" had been added before "*fifty-eight*" without appearing suspicious: and the other in which an alteration had likewise been made in the sum, but so as to have a crowded appearance: it was held that the acceptors were bound upon the first bill to the full amount to a *bona fide* holder without notice; but upon the second that the parties were discharged altogether.³

The Effect of Alteration.

§ 30. The effect of material alteration of a bill or note will be considered, (1) In respect to *fraudulent alterations*, and (2) in respect to *alterations innocently made*. The effect of immaterial changes, not amounting to alterations, will be separately considered.

In the first place, as to *fraudulent alteration*, when a party to a bill or note fraudulently alters its legal effect, he not only destroys

from whom such paper is received, and who are always bound to respond for the consideration, if it is forged: *Little vs. Derby*, 7 Mich. 325. If a party makes a contract in such a manner as is authorized by law he has a right to object to being bound to any other. A *bona fide* holder, before maturity, is allowed to receive the genuine contract, discharged from any equities attached to the contract itself, as between the original parties, but he cannot get a contract where none was made."

¹Hall vs. Fuller, 5 Barn. & C. 750.

²Hall vs. Fuller, 5 Barn. & C., 750; Garrard vs. Haddan, 67 Penn. St., 82; Worrall vs. Gheen, 3 Wright, 388; Thomson on Bills, (Wilson's ed.) 43.

³Pagan vs. Wylie; Graham vs. Gillespies. See Thomson on Bills, (Wilson's Ed.,) 42, and Ross on Bills, 104-95.

the instrument by thus destroying its legal identity, but he also extinguishes the debt for which it was given. And it cannot afterwards be made the basis of, or evidence for, a recovery in any form of action whatever;¹ though, of course, it might be admissible to defeat a claim on the ground of fraud, or convict a party of a crime.² It is necessary that the law should impose this forfeiture of the debt itself upon one who fraudulently tampers with the instrument which evidences, or secures it; and it is done upon the principle that "no man should be permitted to take the chance of gain by the commission of a fraud, without running the risk of loss in the case of detection."³

Alterations Innocently Made.

§ 31. In the next place as to alterations innocently made, it is considered by a number of authorities that when the alteration is material the instrument is *ipso facto* avoided; and the original consideration forfeited, no regard being paid to the inquiry whether or not the alteration was fraudulent as well as material, it being said in a case of this character in Vermont, by Pierpoint, J., "the forfeiture of the debt is one of the penalties which the law imposes upon the party who alters or tampers with the written evidence which he holds of his claim."⁴ On the other hand, in a number of English and American cases, it has been considered that a material alteration only avoided the instrument, and if it were given for a debt,⁵ or in renewal of a bill or note,⁶ the holder might still sue upon the original cause of actions,—no question of fraudulent intent being raised in the pleadings or appearing in the case.

§ 32. It is universally declared that there can be no recovery upon an instrument in its altered form, and when it has been shown that a bill or note has been materially altered, it is to be presumed that it was done fraudulently, and we should say that without explanation it would consequently operate as an avoidance of the instru-

¹Newell *vs.* Mayberry, 3 Leigh, 254; Smith *vs.* Mace, 44 N. H., 553; Clute *vs.* Small, 17 Wend., 238; Merrick *vs.* Boury, 4 Ohio St., 70; Wallace *vs.* Harmstad, 44 Penn. St., 492, (a deed.)

²Chitty on Bills, (13 Am. Ed.) top p. 219.

³Newell *vs.* Mayberry, 3 Leigh, 254.

⁴Bigelow *vs.* Stephens, 35 Vt., 525; Markendale *vs.* Follet, 1 N. H., 99.

⁵Atkinson *vs.* Hawden, 2 Ad. & E., 169, (29 E. C. L. R.) Bill altered in date from 30th to 28th of December. *Held*, Drawer could recover original consideration of acceptor.

⁶Sleman *vs.* Cox, 1 C., M. & R., 471. Bill given in renewal altered in date from 20th to 24th of June, and it was held⁵ that there could be suit on original bill.

ment and a forfeiture of the debt.¹ But it seems too harsh to inflict the penalty of losing a debt when there has been no fraudulent design which calls for punishment; and when the holder of the altered paper rebuts the *prima facie* presumption of fraud, and shows that his head or hand, and not his heart, has erred, it is but just that he should be permitted to recover of the maker of the note if he be the payee, the original consideration, or of the indorser, if he be the indorsee. And there are numerous and weighty authorities which sustain this view.

§ 33. But there may be many cases in which it would work injury, loss or inconvenience to the maker or indorser, to allow a recovery of the original consideration. If the indorser were sued, he could not have the maker's note restored to him as a foundation for his action if it were utterly annihilated by the alteration. And the indorsee might have rendered such a consideration as could not be recovered back: for instance, professional services, labor, or another note. For these reasons, it would seem just to allow a more specific remedy; and while we have seen no precedent which so decides, we should say that a court of equity would, under its jurisdiction over mistakes, correct an alteration innocently and mistakenly made, and restore the instrument to its original form.² And there is no sufficient reason why the party should not himself be permitted to undo what he has mistakenly done, provided no other person has become so situated towards the instrument that it would operate prejudicially upon him.³ The burden of proving innocence would be a sufficient safeguard to prior parties; and when innocence is clearly proven, and the *prima facie* presumption of guilt overthrown, it would seem too rigorous to inflict upon the innocent a penalty only deserved by the guilty.

This view was forcibly presented in Pennsylvania in a case where within an hour or two after the note was signed, the payee returned to the maker's office, where his clerk, at the payee's request, but without knowledge or consent of the indorser, inserted "*with interest.*" The maker ratified the clerk's action. But subsequently the payee had the inserted words expunged, apparently with chemicals, and sued the indorser upon it in its original form. The latter claimed that the note had been avoided as to him by the alteration; but it

¹Vogle vs. Ripper, 34 Ill., 100; Clute vs. Small, 17 Wend., 238; Merrick vs. Boury, 4 Ohio St., 70.

²See Chadwick vs. Eastman, 53 Maine, 16. This seems to be hinted.

³2 Parsons, N. & B., 570.

was held, that no fraud having been intended, the plaintiff had a right to restore it to, and sue upon it in, its original form.¹ And in Massachusetts where a special indorsement was erased by mistake, and no one could suffer from its restoration, the cancelled words were allowed to be replaced, the court saying: "Justice requires and the law allows it to be done."²

Effect of Immaterial Change with Fraudulent Intent.

§ 34. It is said by some of the authorities, and by Greenleaf in his Treatise on Evidence, that if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.³ There are other cases in which this doctrine is laid down;⁴ but in none of those quoted by the learned author, or which we have seen, did it appear that the alteration was immaterial, and was held to have vitiated the instrument by reason of the fraudulent intent. If the change destroys the identity of the instrument, it is material; but it has been well said, "an immaterial alteration may be treated as no alteration;"⁵ and accordingly held that if the act itself is immaterial and can work no injury, it is irrelevant to inquire into the motives with which it was committed. Intent not manifested in a material respect is nugatory, and this we conceive to be the true doctrine.

JOHN W. DANIEL.

Lynchburg, Va.

¹Kountz *v.* Kennedy, 63 Penn. St., 187 (1870), Thompson, C. J., saying: "Now it seems to me, that, as the identity of the note remained, and there was nothing in it to enlarge the obligation of the indorser, and as what had been done was innocently but mistakenly done, and expunged for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this. I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded as it manifestly was, to the indorser immaterial." Sharswood, J., dissented.

²Nevins *v.* DeGrand, 15 Mass., 436.

³Greenleaf on Evidence, vol. 1, 568.

⁴Lubbering *v.* Kohlbrecher, 22 Mo., 598; Turner *v.* Billagram, 2 Calif., 523.

⁵Moge *v.* Herndon, 30 Miss., 120.

Digest of English Law Reports, for May, June and July, 1873.

[COMMON LAW AND EQUITY SERIES.]

APPEARANCE OF DEFENDANT.

The plaintiff and his sister had given a mortgage to M., a solicitor, and the bill was filed against M. and the sister to have accounts taken for what was due, and for redemption. The sister was alleged to be of unsound mind, though not found so by inquisition. The plaintiff's solicitor did not serve the bill on the sister, but, by the plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the Rolls the appointment of a guardian *ad litem*. The appearance and the appointment of a guardian were discharged by Wickens, V. C., on evidence that the sister had sufficient capacity to authorize a solicitor to act for her, and that she had authorized M. so to act.

Held, On appeal, that whether the capacity of the sister was proved or not, the order of the Vice-Chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular: *Camps v. Marshall*, vol. 8, L. C. & L. J. M., 462.

"AUCTIONEER."

Liability—Withdrawal of Goods Advertised for Sale. The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. The plaintiff, a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses.

Held, That plaintiff could not maintain the action: for that the advertising the sale was a mere declaration and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale: *Harris v. Nickerson*, vol. 8, Q. B., 286.

BILL OF EXCHANGE.

Alteration in Date—Plea Denying Acceptance. An alteration in the date of a bill of exchange payable at a specified period after date is a material alteration; and where the bill is declared upon with its altered date, the defense is available to the acceptor under a traverse of the acceptance: *Parry v. Nicholson*, (13 M. & W., 778), discussed, *Hirschman v. Budd*, vol. 8, Ex., 171.

CONCEALMENT.

Marine Insurance—Election to avoid Contract—Delivering out Policy. The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria*, without disclosing to the defendants certain informa-

tion in his possession, which it was material that they should know (October 10th). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13th) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14th or 15th). Upon receiving news of the loss of the vessel, they gave notice to the plaintiff that they did not consider the policy binding on them (October 20th). On the trial of the action upon the policy, the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy. The jury having found that the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the court below:

Held, (reversing the judgment in the court below), that this direction was right; and that there being no election in fact, and no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election: *Morrison v. Universal Marine Insurance Co.*, vol. 8, Ex. (Ex. Ch.), 197.

CONDITIONAL BEQUEST.

A testator gave certain personal estate to a college for founding a professorship of archaeology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate the bequest, together with a copy of the rules and regulations, to the college, and that, within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations; and in case the college should decline to accept them, the bequest should be void, and the property should sink into his residuary estate.

The testator died without preparing any rules and regulations for the professorship:

Held (reversing the decision of Bacon, V.-C.), first, that the reference to the proposed rules could not be read as a description of the professorship intended to be founded, but merely as a condition attached to the bequest; and, secondly, that as the condition had become impossible by the act of the testator, the bequest took effect absolutely: *Yates v. University College, London*, vol. 8, L. C. & L. J. M., 454.

CONDITIONAL LEGACY.

Gift to F. of £17,000, provided that, upon attaining twenty-one, or within six months next after, he should, by such legal instruments as counsel should advise, at the cost of the executrix, relinquish and make over to his brother and sister all interest under his parents' settlement; and in case he should neglect to do so within that time, the £17,000 should be reduced to 12,000, and the 5,000 should fall into the residue. The legatee was in India, serving in the army, at the time specified, and was not informed of the clause, but he subsequently relinquished and made over all interest under his parents' settlement, to his brother and sister.

Held, That the £5,000 belonged to the residuary legatees: *In re Hodges' Legacy*, vol. 16, V.-C. W., 92.

CONVERSION.

A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, F., M., and J., as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, F. and J. purchased M.'s third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. F. and J. then continued the business on the land. F. subsequently died intestate:

Held, that both the devised and the purchased land employed in the business was converted: *Waterer vs. Waterer*, L. J. J. for V.-C. W., 402, vol. 16.

DOMICIL OF INSOLVENT.

W. D., who had settled as a grazier in Australia, and had, upon his own petition, been adjudicated an insolvent and received his certificate there, afterwards visited England in 1868, and died there intestate, leaving a widow in Australia, and creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father and mother of W. D., the father, who died in 1869, had power to appoint a fund amongst his children, who, in default of appointment, were entitled equally. The power was not exercised. W. D.'s share of the fund had been paid into Court. On a petition by the official assignee in the insolvency, it was held that he was entitled to the fund in Court.

In re Blüthman (Law Rep. 2 Eq. 23) discussed. *In re Davidson's Settlement Trusts*. L. J. J. for V.-C. W., 383, vol. 16.

EQUITY TO A SETTLEMENT.

On a marriage in 1862, the parties having no property, no settlement was made; but the husband, at the wife's request, gave up an appointment producing more than £300 a year. In the same year the wife's mother settled funds producing about £1,000 a year on the wife for life, for her separate use, with remainder to the children, giving the husband £200 a year for life after the death of his wife; and shortly afterwards she gave the wife a further income of above £700 a year for her separate use. The wife allowed the husband £100 a year till 1865, when they ceased to live together. In December, 1870, he obtained a decree for restitution of conjugal rights, and a separation deed was thereupon executed by which she agreed to give him an annuity of £300 a year, and to maintain their two children while with her, his rights as to her unsettled property not being affected. At this time the wife had saved about £6,000 out of her separate income. It appeared that the husband was not to blame in the disputes. A sum of £6,000 having devolved upon the wife under the intestacy of a relation:

Held, (affirming the decree of Malins, V. C.,) that the wife was not entitled to any settlement out of this sum: *Giacometti vs. Prodgers*, L. C. & L. JJ., 338, vol. 8.

FENCES.

Prescriptive Obligation to maintain—Nature of the Obligation—Consequential Damage.—The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by

H., and died in consequence. The defendant had had no notice of the fence having been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close:—*Held*, that the evidence showed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close; that the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted, without any notice of want of repair; that the damage was not too remote; and the defendant was therefore liable to the plaintiff for the loss of the cows: *Lawrence v. Jenkins*, Q. B., 274, vol. 8.

FORFEITURE CLAUSE.

By a will certain property was given upon trust for A. during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over:

Held, that the gift over took effect upon A. executing a composition deed containing a recital that he was unable to pay his debts in full; and that A. could not afterwards dispute the accuracy of the recital: *Bilson v. Crofts*, M. R., 314, vol. 16.

FRAUD.

False Representation—Signature of Party to be charged—9 Geo. 4, c. 14, s. 6—*Signature by Agent of Company formed under 7 Geo. 4, c. 46—Principal and Agent—Action against joint Tortfeasors*. The plaintiff sued W. & G. jointly, for false representation with respect to the solvency of R. The defendant W. was sued as the public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant G. was the manager at one of their branches. The plaintiff was a customer of the S. Bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R. was responsible to the extent of £50,000. The defendant G. wrote a letter, which he signed as manager, giving a favorable reply as to R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:

Held, first, that the signature of G. as manager was the signature not merely of an agent, but of the defendants' banking company itself, and therefore the signature of the party to be charged within s. 6 of 9 Geo. 4, c. 14, s. 6, so as to make the banking company liable for his false representation. Secondly, that the letters showed that the communications were between the two banks; and the representation was not merely the representation of G. personally, but of the defendants' banking company. Thirdly, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R.'s solvency might have been made on behalf of a customer of the S. Bank, and that the representation

might be communicated to him; and that the banking company and G. were liable to the plaintiff, he being the customer who had made the inquiry. Fourthly, that, on the authority of *Barwick v. English Joint Stock Bank* (Law Rep. 2 Ex. 259), the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank. Lastly, that, as all persons directly concerned in the commission of a fraud are to be treated as principals, the banking company and G. might be sued jointly: *Swift v. Winterbotham*, P.O., and *Goddard*, Q. B., 244, vol. 8.

FRIENDLY SOCIETY.

"Sickness"—*Insanity*. By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness."

Held, that insanity was "sickness" within the meaning of the society's rules: *Burton v. Eyden*, Q. B., 295, vol. 8.

JOINT AND SEPARATE ESTATES.

Proof of Debts—Proof by Partner against Estate of Co-partner—Principal and Surety. H., a partner in a banking firm, entered into a bond with a board of guardians, on being appointed their treasurer, with two sureties, one of whom was K., a partner in the firm, and the other was E., who was not a partner. H. kept the account of the guardians' money at his bank under a special heading, "Norwich Union," and a sum of £5,677 was standing to that account when the bank stopped payment. H. died shortly after the stoppage, and his estate was administered in Chancery. The other partners were adjudicated bankrupts. The joint estate and H.'s separate estate were alleged to be insolvent; joint debts to a large extent remained unpaid; K.'s separate estate was solvent. The amount due to the guardians was paid by E., who recovered by proof upon the separate estate of K., his co-surety, one moiety of the amount paid. The trustee of K.'s separate estate, who was also the trustee of the estate of the bankrupt partners, then claimed to prove against H.'s separate estate for the amount of the moiety paid to E. out of K.'s estate:

Held, that, as the partnership received the money from and owed it to the guardians, the relation of principal and surety never in reality existed between H. and K. The claim, therefore, was disallowed.

Order of the Master of the Rolls affirmed.

Whether *Ex parte Topping* (1) would apply to a case where the separate estate in respect of which the proof is sought to be made, is solvent, so that any surplus would go to the joint estate, *Quære*: *Lacey v. Hill*, L. J., 441, vol. 8.

LAPSE.

A testator gave to A. B. a legacy to be vested in him when and as he should attain the age of twenty-one years, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his said legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's life-time, leaving issue:

Held, that the gift over took effect: *In re Gaiskell's Trust*. L. J. J. for V.-C. W., vol. 15., 386.

LIBEL.

1. In an action brought in her Majesty's Supreme Court for China and Japan, for false representations made by the defendant, occupying an official post in the service of the Emperor of China, to the *Thung-li-Yamen*, the head of the Foreign Board at

Peking, respecting the conduct of the plaintiff as a Professor in the College established there, which led to his dismissal by that Board, the alleged misrepresentations being that the plaintiff had asked to be relieved from his duties, and declined to perform them, and that he had absented himself from Peking at a time when his active services might be required at the College. The defendant, in reply, denied that he had made any false representations, and asserted that such representations as he had made were contained in a report made by him in the course of his duty as an officer of the Chinese Government. The Judge in his summing up directed the jury that, whether the defendant had made false representations, and the Chinese Government had dismissed the plaintiff in consequence, was a thing specially for the jury to consider, and whether the representations were warranted by facts. The jury found for the plaintiff, and gave large damages. A rule nisi was afterwards obtained for a nonsuit, or new trial, on the ground of misdirection, and that the verdict was against evidence. The misdirections complained of were (1) that the Judge did not direct the jury that the representations were privileged; (2) not leaving to the jury the question, whether the representations were willfully false; and (3) that there was no evidence to go to the jury that the representations were willfully false. The Supreme Court discharged the rule. On appeal:

Held, By the Judicial Committee, that the Judge's summing up was erroneous, that the representations complained of were privileged communications, that the Judge ought to have explained to the jury the relation and position of the parties, and have told them that the action would not lie, if the statements were made honestly and in a belief of their truth, without proof of express malice, and not whether they were warranted in fact, and that the burden was on the plaintiff to prove that they were not so made: *Hart v. Gumpach*. 439.

2. The charge of a Bishop to his Clergy in Convocation is, in the ordinary sense of the term, a privileged communication; on the well-known principle that a communication made *bona fide* upon any subject-matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminal matter which, without that privilege, would be defamatory and actionable; provided that the occasion on which the communication is made rebuts the *prima facie* inference of malice, in fact, arising from a statement prejudicial to the character of the plaintiff, and the *onus* is upon him to prove that there was actual malice, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

So *held*, where the Bishop of *Sodor and Man*, in a charge to his Clergy in Convocation, commented on a speech made by a Barrister in his character of an advocate instructed to oppose a bill before the House of Keys, promoted by the Government vesting additional ecclesiastical patronage in the Bishop, in which he impugned the conduct of the Bishop, and attributed to him motives and conduct unworthy of his character and position:

Held, also that the circumstances of the case warranted the Bishop in sending such charge to a newspaper for publication, and that such course being in self-defense, rebutted any presumption of malice on the part of the Bishop: *A. N. Laughton v. Bishop of Sodor and Man*: (Privy Council Appeals) 495, vol. 4.

MAINTENANCE.

On an application by an infant for maintenance, the Court has jurisdiction, without suit, to charge the expenses of his past maintenance, and the costs of the appli-

cation on the *corpus* of a freehold estate to which he is entitled in fee: *In re Howarth*, L. JJ., 415, vol. 8.

MARSHALLING.

A testator domiciled in England died possessed of personal estate and also of real estates in Scotland. His will purported to deal with the Scotch real estates, but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate, against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:

Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country, where the testator's estate was being administered.

Secondly, that as the law of Scotland threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favor of the pecuniary legatees:

Thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates, and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election.

Decision of the Master of the Rolls reversed.

Seemle, that if the real estate had been situate in England, the costs of the suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate: *Harrison v. Harrison*, L. C. & L. JJ., 342, vol. 8.

NEGLIGENCE.

Railway Company—Liability of one company for negligence of another with running powers—Parliamentary Agreement as to traffic. The N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants:

Held, that he was not entitled to recover.

Great Western Ry. Co. v. Blake (H. & N., 987); *Thomas v. Rhymney Ry. Co.* (Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266), considered and distinguished *Wright v. Railway Co.*, Ex. 137, vol. 8.

NEPHEWS AND NIECES.

Residuary gift in trust for "my nephews and nieces living and the issue of any of my nephews and nieces dead before me." Testator left brothers and sisters, but never had any nephews or nieces of his own:

Held, that his wife's nephews and nieces were entitled to the gift: *Sherratt v. Mountford*, M. R. 305, vol. 15.

NOTICE TO TRUSTEES.

Funds belonging to L. M. were, on her marriage in 1834, vested in three trustees, (one of whom died in 1840) in trust for her for life for her separate use, without power of anticipation, and after her death for the children of the marriage, and in case there should be none, for such persons, if she should die in her husband's lifetime, as she should appoint. In 1843 the husband and wife executed a deed to secure the payment of moneys due from him, and the wife appointed that in case there should be no child of the marriage, and if she should die in the husband's lifetime, the trustees of the settlement of 1834, should, out of the trust funds, raise sufficient to pay the husband's debt.

Notice was given of the deed of 1843 to the two surviving trustees of the settlement.

In 1848 the wife and the sole surviving trustee of the settlement, who desired to retire, appointed three new trustees, and assigned to them the trust funds. One of those trustees died, and the two surviving trustees and the survivor of them, at the request of the husband and wife, dealt with some of the trust funds, which ultimately were much diminished. A portion of the funds was invested in the purchase of leasehold premises, which were held upon the trusts of the settlement. The wife died in March, 1870, without having had any child. The husband survived. The survivor of the trustees of 1848, in May, 1870, received a notice from R. L. of a charge on the leaseholds in his favor, dated the 5th of October, 1864, and in October, 1870, he received a notice of the deed of 1843:

Held, that the surviving trustees of 1848, were not liable to make good the funds which had been lost; that R. L. was not entitled to priority over the trustees of the deed of 1843; and that the persons claiming under the deed of 1843, were entitled to the funds which remained in part satisfaction of the moneys due to them.

Assignees of an equitable interest should, if they desire to be perfectly secured, obtain a *distingas* on the funds; or have their deed indorsed on the original deed; or obtain a transfer of the funds into Court.

Semble: New trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance; and it has never been the practice of the Court on appointing new trustees of funds to make such an inquiry: *Phipps vs. Lovegrove*; *Prosser vs. Phipps*. L. J. J. for V.-C. W., 80, vol. 16.

NUISANCE.

The occupier of a house in a street in London had, many years ago, converted the ground floor into a stable. In 1871, a new occupier altered the stable so that the noise of the horses was an annoyance to the next door neighbor, and prevented him from letting his house as lodgings:

Held, that the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbor of his right to have the nuisance restrained.

Annoyance caused by the unusual use of a house may be a nuisance where like annoyance from the ordinary use of it would not be.

Decree of the Master of the Rolls reversed: *Ball vs. Ray*, L. C. & L. JJ., 467, vol. 8.

ORDER OF DISPOSITION.

At the time of the presentation of a petition for liquidation by arrangement, there were lying in the bonded warehouse of the debtors, who were wine and spirit mer-

chants in Liverpool, certain butts of whisky which they had sold to the Appellant. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine and spirit trade, in Liverpool, for goods sold in bond to remain in the possession or under the control of the vendors in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use.

Held (reversing the decision of the Chief Judge), that the existence of a custom of this nature, shown to be well-known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee.

Hamilton vs. Bell (10 Ex. 545); *Priestley vs. Pratt* (Law Rep. 2 Ex. 101); and *Prissnall vs. Lovegrove* (6 L. T. (N. S.) 329), approved; *Knowles vs. Horsfall* (5 B. & A. 134), observed upon. *Ex parte Watkins. In re Couston.* L. C. & L. J. M., 520, vol. 8.

POWER OF APPOINTMENT.

Invalid exercise of power—Extent of Invalidity—Power of Appointment over Realty—Conversion—Gift to the Executors or Administrators of A.—Personæ Designatæ. Husband and wife, having, under their marriage settlement, a joint power of appointment over personality in favor of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as H. (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint; and in default of such appointment, upon trust for H. for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent), and after H.'s death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:

Held, that the appointment to such uses as H. should appoint, with consent of the trustees, was void, but that the limitation over in default of appointment by H. was valid, and gave H. an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.

Husband and wife had a joint power of appointment over real estate, among the children of the marriage for such estates and interests, and in such manner as they should think fit. In default of and subject to such appointment the estate was to be held, subject to the parent's life interest, in trust for all the children to whom no share had been appointed, to vest in them at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for absolute sale.

The husband and wife appointed two-fourths to H. and another of their children, the appointment to H. being in the same terms as that of the personality, and declared that the shares of any person interested in the capital arising from any sale under the settlement should be of the quality of personal estate:

Held, that the appointors had power to convert the real into personal estate, and that H. took an absolute interest in his share subject to the same contingency as in the case of the personality: *Webb vs. Sadler*, L. C. & L. JJ., 419, vol. 8.

POWER TO APPOINT BY WILL.

A testator gave certain property upon trust for his granddaughter A. for life, and

after her death for her children, or some of them, as she should by deed or will appoint. A., by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and after the death of each child directed that the share in which the child had a life interest should be held in such a manner as the child might by will appoint, with limitations over, in default of appointment, in favor of the children of the said five children and of the survivors in different events:

Held, a good exercise of the power of appointment given by the will of the testator, *Phipson v. Turner* (9 Sim. 227) followed. *Stark v. Daykins*, XV. M. R., 307.

PRIVILEGED COMMUNICATION.

Libel and Slander—Proceedings of Court of Inquiry instituted by Commander-in-Chief under articles of War—Evidence. A court of inquiry, instituted by the Commander-in-Chief of the army under the Articles of War to inquire into a complaint made by an officer of the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognised in the Articles of War and the Mutiny Acts; and statements, whether oral or written, made by an officer summoned to attend before such court to give evidence, are absolutely privileged, even though they be made *mala fide*, and with actual malice, and without reasonable and probable cause. Such statements are part of the minutes of the proceedings of the court, which, when reported and delivered to the Commander-in-Chief, are received and held by him on behalf of the sovereign, and on grounds of public policy can not be produced in evidence: *Dawkins v. Lord Rokeby*, Q. B. (Ex. Ch.) 255, vol. 8.

PRODUCTION OF DOCUMENTS.

1. A plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case or supporting or material to the case of the defendant: *Bolton v. Corporation of Liverpool*, 1 My. & K., 88, considered.

2. A plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation: *Pearse v. Pearse*, 1 De G. & Sm. 12, and *Laurence v. Campbell*, 4 Drew, 485, approved.

3. Order of the Master of the Rolls affirmed: *Minet v. Morgan*, L. C. & L. J. M., 361, vol. 8.

RAILWAY COMPANY.

1. *Negligence—Evidence of Defendants' Liability—Contributory Negligence—Nonsuit.* In an action against the defendants for negligence, it was proved that the plaintiff, being a passenger on defendants' railway, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The jury having found for the plaintiff: leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendants' liability:

Held, by the Queen's Bench and Exchequer Chamber, that there was evidence, and that the verdict ought to stand.

Quære, how far the question of contributory negligence is open in such cases:

Adams v. Lancashire and Yorkshire Ry. Co., (Law Rep.) 739, 4 C. P. questioned; *Geer v. Metropolitan Railway Company*, Q. B. (Ex. Ch.), 161, vol. 8.

2. *Carriers of Cattle—Negligence—Conditions as to Restiveness of Cattle—Principal and Agent—Agreement for Interchange of Traffic.* The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he booked her for S. by the defendants' railway. He signed a contract under which it was agreed between him and the G. N. Co. that they should not be responsible for any loss or injury to cattle, in the delivering, if such damage should be occasioned by plunging or restiveness. The cow was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, &c., should be established from all parts of one company and beyond its limits to all parts of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendants for the loss of the cow, the court having power to draw inferences:

Held, first, that the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, showed that the G. N. Co. became the agents of the defendants to make the contract for the carriage of the cow. Secondly, that the condition in the contract did not relieve the defendants from liability for negligence on the part of their servants in delivering the cow. Thirdly (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the inference to be drawn from the facts was that there was negligence on the part of the defendants' porter; and that they were, therefore, liable to the plaintiff for the loss of the cow: *Gill v. The Manchester, Sheffield, and Lincolnshire Railway Company*, Q. B., 186, vol. 8.

REVOCATION OF WILL.

A codicil revoking a will does not necessarily revoke a prior codicil. A testator made a will and two codicils, by none of which he gave anything to St. Catharine's College. and many years afterwards he made another codicil, describing it as a codicil to his last will; and thereby, after reciting that by his said will he had bequeathed £1,000 to St. Catharine's College, he confirmed the said bequest, but in all other respects he revoked his said will; and he gave to St. Catherine's College (in addition to the bequest of £1,000) a sum of £5,000, and appointed executors of his said will and codicil:

Held, that the last codicil revoked the will of the testator, but not the codicils of prior date.

Held, also, that under the last codicil St. Catharine's College was entitled to a legacy of £6,000 in the whole: *Farrer v. St. Catharine's College*, Cambridge, L. C. for M. R., 19, vol. 16.

SECRET TRUST.

1. Testator gave the residue (which amounted in value to about £8,500) of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, and if no children,

for the husband absolutely. In the event of the death of the wife in the life-time of her aunt, N., testator directed that the then legally secured income of the aunt, if below £250 a year, should be made up to that amount.

2. From the death of the testator, in April, 1861, down to February, 1865, an annuity of £300 was regularly paid to N., by arrangement, out of the husband's banking account; but the wife having eloped in September, 1864, the payment was, after the above date, discontinued.

3. In 1869 the bill was filed by N. against the husband and wife, alleging by amendment, after the answer of the wife (who supported the plaintiff's case) had come in, that the husband and wife both promised the testator, at his request, on his death-bed, to make an allowance of £300 a year to the plaintiff, and praying for a declaration that the income of the testator's residuary real and personal estate "was and is subject to a trust" for the payment of £300 a year to the plaintiff during the wife's life, if the plaintiff should so long live; and for payment of the arrears of the annuity by the husband.

4. The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to the testator by the wife, and was assented to by the husband:

Held, that the income of the testator's estate was subject to the alleged trust; and an account and payment ordered accordingly.

No costs allowed to the plaintiff, who was merely a nominal suitor; the suit being in substance that of the wife: *McCormick v. Grogan*, Law Rep. 4, H. L. 82, followed; *Norris v. Fraser*, V.-C. B., 318, vol. 20.

STATUTE OF FRAUDS.

The plaintiffs agreed to purchase an estate from the L. Society, and to pay a deposit on the signing of the contract. Before it had been signed, the plaintiffs verbally agreed with B. to make it over to him on certain terms. In order to enable B. to deal with the L. Society, the plaintiffs signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the L. Society the deposit, and engaging to pay a certain sum to the plaintiffs; the other terms of the bargain between the plaintiffs and B., which were in favor of the plaintiffs, being at B.'s request omitted from the memorandum. On the same day the contract between the plaintiffs and the L. Society was signed, and the part signed by the L. Society was given to B., who paid the deposit. B. afterwards repudiated all the stipulations in favor of the plaintiffs which had not been inserted in the memorandum. The plaintiffs then filed their bill against B. and the L. Society, asking to have the memorandum between B. and the plaintiffs cancelled, and for a conveyance from the society on payment of what was due to them:

Held (affirming the decision of Malins, V.-C.), that a demurrer by B. was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the plaintiffs and B., and any use of it by B. for a purpose inconsistent with that agreement was fraudulent:

Held, further, that if the plaintiffs could have maintained a bill for specific performance of the parol agreement between them and B., on the ground that it had been in part performed—as to which *quære*—they were not bound to do so; but that, as B. had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the L. Society:

Held, further (differing from Malins, V.-C.), that the bill was not demurrable for want of an offer to repay to B. what he had paid to the society: *Jervis v. Berridge*, L. C. & L. JJ., 351, vol. 8.

VOLUNTARY SETTLEMENT.

The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement.

A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property:

Held (reversing the decree of *Wickens*, V. C.), that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions: *Hall v. Hall*, L. C. & L. J.J., 430, vol. 8.

WILL.

1. A testator had three sons, *John, Thomas, and Robert*. He devised to each, in the same form of words, a separate property for life, and after a son's death, to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises, so specifically devised to such one or more of them so dying, unto his widow and her assigns for and during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, and after him the second son, each leaving a widow, but no child:

Held, that each widow was entitled to a life estate in all that had been possessed by her husband during his life.

The proviso is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or chattels. "So" in this case is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive.

In this will the description was meant to apply whether the property was given directly, as in the first instance, or indirectly, as in the second instance.

The proviso being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only: *C. L. F. Giles, et ux, v. Ann Melson*, (House of Lords), 24, vol. 6.

2. Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.

In 1558 a testator gave certain houses in *Old Change* to his son and the son's heirs, but, if the son died without issue, to the *Wax Chandlers* of the City of London, "for this intent and purpose and upon this condition," that they should distribute annually £8 in the manner therein described, viz: £3 18s. to the poor of *St. Mary Magdalen*, and 2s. to the churchwardens for their painstaking; 38s. to the poor of the parish of *Bezley*, in *Kent*, and 2s. to the churchwardens of that parish for their pains; 35s. to

the poorest men and women of the *Company of Wax Chandlers*, and the other 5s. to the Master and Wardens of the Company, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements." If the Master and Wardens should leave any of these things undone, the property was to go over to the testator's next of kin, "upon condition that they should do all these things." The son died unmarried, and the *Wax Chandlers* entered into possession, kept the premises in repair, and, after the great fire of *London*, rebuilt them. The rents had largely increased:

Held, that the will created a trust; that all the income was exhausted by the appropriations of it directed by the will, and that consequently the whole was properly applicable to purposes of charity.

The *Wax Chandlers* had in 1790 purchased a small piece of property adjoining the devised land, and had built upon it, so that the original and the purchased property were now conjoined and formed one whole. There was no distinct proof as to the funds out of which this added property had been purchased. In the absence of such proof, it was *held*, that the added property must be treated as belonging to the *Wax Chandlers*; and it was declared that it did belong to them, and an order was made for an inquiry to distinguish the two properties, and for the application of the rents and profits thereof.

To declare under such circumstances as existed here that this added property was to be applied to the purposes of the charity would be like following and taking possession of the back rents *bona fide* received by the company: a course which the practice of the Court did not sanction.

"Reparation" of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them: *The Attorney-General v. Wax Chandlers' Company*, (House of Lords), 1, vol. 6

SELECTED DIGEST OF STATE REPORTS.

[For this number of the Review, selections have been made from the following State Reports: 42 California; 45 Georgia; 36 Maryland; 59 New Hampshire (continued); 38 North Carolina (continued); 2 South Carolina (new series).]

ABATEMENT.

At common law a suit, when abated, is absolutely dead, but in equity an abatement signifies only a present suspension of all proceedings in the suit from the want of proper parties capable of proceeding therein: *Pringle v. Sizer*, 2 S. C. (new series), 59.

ACCORD AND SATISFACTION.

Where a debtor pays the principal of his debt, which is received by the creditor, in full satisfaction, whether the debt be past due, or running to maturity, it is a good defense, and may be pleaded as an accord and satisfaction: *Wescott v. Waller*, 42 Ala., 492.

ACCOUNT STATED.

Bill by the administrator of a deceased ward against the executor of the guardian, to open an account stated and settled between plaintiff and defendant, on the ground of mutual mistake in this, that in the settlement no account was taken of an estate in which the ward was entitled to a distributive share, and of which the deceased guardian was the administrator. The settlement was based upon the guardian's returns, and the defendant, in making it, had acted in entire good faith. Relief refused mainly on the grounds of want of proof that the guardian's returns were false, and because it appeared that the plaintiff possessed at the time of the statement, substantial information of the facts alleged in his bill as the ground of relief. The authorities reviewed and the principles stated upon which courts of equity give or refuse relief in suits to open or to surcharge and falsify stated accounts and accounts settled, where they are impeached on the ground of fraud or mistake: *McDow v. Brown*, 2 S. C. (new series), 95.

ADMINISTRATION.

A decree, in a suit for distribution among creditors of the assets of an insolvent intestate estate, which ascertains the amount of assets then realized and that they are sufficient to pay the judgments, specialty debts, and 12 3-7ths per cent. of the simple contract debts, and directs that they be so applied, does not bar the specialty creditors of their right to priority of payment out of assets afterwards realized—those realized at the time of the decree having been lost without fault on their part: *Gunter v. Gunter*, 2 S. C. (new series), 11.

ADMINISTRATORS.

A sale of land of a testator or intestate by the executor or administrator, in the manner prescribed by law, where the estate is insolvent, divests the liens of judg-

ments obtained in the life-time of the testator or intestate, and the creditor must look to the proceeds in the hands of the representative of the estate: *Sims v. Ferrill*, 45 Ga., 585.

AGENT AND AGENCY.

1. What an agent says in the course of doing an act in the scope of his agency, characterizing or qualifying the act, is admissible as part of the *res gestæ*. But if his right to act in the particular matter in question has ceased, his declarations are mere hearsay, which do not affect the principal: *Smith & Melton v. N. C. R. R. Co.*, 68 N. C., 107.

2. The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past can not be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company: *Ib.*

3. The depreciation of Confederate money is not between private parties constructive notice to the agent and the person paying the same, that the principal will not receive it. Otherwise, where the receiving agent is an officer of the Court, or one acting in a fiduciary capacity: *Ib.*

4. Testimony as to transactions which took place between the defendant and an agent, since deceased, is admissible evidence in a suit brought by the principal against such defendant. Especially so, if the acts and agreements of the agent were afterwards communicated to the principal and by him assented to: *Howerton v. Lattimer*, *Ib.*, 370.

5. For mere error in judgment, an agent, with authority to do the best he can, is not liable: *Long v. Pool*, *et al.*, *Ib.* 479.

APPEARANCE.

1. Where a defendant was served out of the State, and an attorney then with him signed and transmitted a document to the effect that as defendant's attorney he acknowledged service, and authorized a judgment to be taken as prayed for:

Held, sufficient to show a voluntary appearance, and to justify the entry of an immediate judgment: *Footé v. Richmond*, 42 Cal., 440.

2. Where counsel appears expressly for certain defendants in an action, his signature to papers in the case after that time as the attorney for the defendants, will be construed as limited to those defendants for whom he expressly appeared: *Spanagel v. Delinger*, 42 Cal., 148.

ARBITRATION AND AWARD.

Where a case had been referred for an account and report, and the report had been made and set aside by consent, and then by consent of parties it was ordered that the case be remanded for an additional report, showing what fund of the estate still remains after setting aside the sum of \$2,000 due the plaintiff B., showing also how each of the children of the testator stand towards each other as to the amounts received, what is due from each of them to the administrator, or from the administrator to each of them, and what is due to each other: And for the better adjustment of the matters in question, it is referred to J. H. T., as arbitrator, whose award shall be a rule of Court, and who shall state the account necessary to exhibit what is here required, &c.:

It was held, that it was a reference to arbitration, and that the report of the arbitrator was an award, and not merely the report of a referee to take an account, and it was held further that the arbitrator had not exceeded his power in stating an account of the whole estate: *Hilliard and wife, et al. v. Rowland, Adm'r.*, 68 N. C., 506.

ASSIGNMENTS.

It is error to charge a jury that a debtor who is insolvent can make no assignment by which a creditor is preferred, or to charge that a debtor, who is insolvent, is unable to make any preference to secure a creditor, because such preferences are not allowed by the bankrupt law—the law of the State being that a *bona fide* preference of one creditor by an insolvent debtor is valid, and the Bankrupt Act not avoiding such preferences under all circumstances: *Isaiah v. Ayer & Co.*, 2 S. C. (new series), 344.

ASSUMPSIT.

A. B. and C. entrusted with D., a dealer in horses, one horse each, belonging to them individually, to be sold. D. sold the three horses together to the defendants, on credit, for \$650,—no separate price being made for either of them in the trade. The three individual owners afterwards joined in an action of *assumpsit* against the purchaser to recover the price:

Held, that the action could not be maintained: *Woodward v. Sherman, et al.*, 52 N. H., 131.

ATTACHMENT.

Where Howe commenced an attachment suit against McCann, and garnished money of McCann's in the Union Insurance Company, and afterwards recovered judgment and issued execution to the Sheriff, who, however, did not receive the money or actually levy the execution, and before any further steps, and within four months of the issuance of the attachment, proceedings in bankruptcy were commenced against McCann, and an assignee of his estate appointed:

Held, that the proceedings in bankruptcy dissolved the lien under the garnishment, and that neither the judgment nor execution, without an actual levy or receipt by the Sheriff of the money, would create any other lien: *Howe v. Union Insurance Co.*, 42 Cal., 531.

BAILMENTS.

1. Ordinary diligence is all that the law exacts of the bailee in a case of pawn or pledge. Ordinary diligence, in the law of bailments is a relative term, and signifies that care which men of common prudence generally take of like articles of their own, at the time and in the place where the question arises.

The question being, whether bankers in Columbia, who had received on deposit certain collaterals, as security for money loaned by them to the bailor, were responsible to the latter for the loss of the collaterals from their banking house by robbery, the Circuit Judge declined, at the request of the bailor, to instruct the jury "that the bailees can not be said to have exercised ordinary care, unless it be found that they have availed themselves of all the means for securing their deposits that art and mechanical skill could afford; and it is a proper inquiry for the jury to say whether proper efforts were made by the plaintiffs to ascertain and secure those mechanical implements of the age, which, without extraordinary diligence could have been secured:

Held, That in this there was no error. *Scott, Williams & Co. v. Crews*, 2 S. C., 522.

2. The Circuit Judge instructed the jury "that the Court could not prescribe any absolute rule or measure of diligence, and that whether ordinary care devolved it upon the bailees, bankers in Columbia, to employ all the means of security known to art, and applicable to their business, was exclusively a question of fact for the jury." The verdict was for the bailees, and on appeal by the bailor:

Held, that in this instruction, there was error, and a new trial was granted. *Id.*

3. A. loaned a sulky and harness, the former the property of his father, to B., to

drive and exercise his horse over the track of the fair grounds of an agricultural society. Whilst so driving, the horse ran away and broke, and greatly injured or destroyed the articles loaned :

Held, that the lender, though not the owner of the sulky, could maintain an action against the borrower to recover its value, and such recovery could be pleaded in bar by him in a subsequent suit by the owner: *Cusey v. Suter*, 36 Md., 1.

4. A. and G. each owned shares of stock in a mining company, all the shares being of equal value. A. delivered a number of his shares to G. to be held as collateral security for money advanced by G. to pay assessments upon the stock of A., and to be sold by G. whenever he could obtain not less than five hundred dollars per share; G. transferred certain of A.'s shares for less than the price named, in fulfillment by G. of a contract for a sale of his own stock, and on settlement with A., G. transferred an equal number of his own shares to A., exchanging receipts with him in full of all demands. Subsequently, A. sued G. for the amount of money received for the shares sold, alleging that the settlement had been procured by false representations on the part of G., and G. defended by showing that he transferred the shares in fulfillment of a contract for the sale of his own stock, and that he, at all times, had and held for A.'s use an equal number of shares of equal value, and that he had so replaced them :

Held, that G. did not become responsible for the proceeds of the sale of the shares. The technical breach of trust presents a case of *damnum absque injuria*: *Atkins v. Gamble*, 42 Cal., 87.

BONDS.

1. Coupon bonds issued by an incorporated railroad company, payable to bearer, are negotiable: *Langston v. S. C. R. R. Co.*, 2 S. C., (new series), 248.

2. A coupon bond issued by an incorporated railroad company, redeemable on a day certain, and a bank named, on the surrender of the bond, bears interest from its maturity, although no demand of payment, or offer to surrender the bond, be made at the bank or elsewhere: *Ib*.

3. An action may be maintained on a bond payable on a day certain, at a place named, without allegation or proof of demand of payment at the time and place mentioned: *Ib*

4. Bonds issued by municipal corporations, under their corporate seal, payable to bearer, are negotiable, and are protected in the hands of the rightful owner, by the usages of commerce, which are a part of the common law: *Weith & Arents v. City of Wilmington*, 68 N. C., 24.

5. The purchaser of a bond from one who is not an agent of the obligee, but to whom the bond had been given for the purpose of handing it to a lawyer for collection, acquires no interest therein, and can not maintain an action for its recovery *McMinn v. Freeman*, 68 N. C., 341.

BURGLARY.

The defendants went to the store house of the prosecutor, in which he was sleeping, between the hours of ten and eleven o'clock at night, and knocking at the door called his name twice, he answered the call, and told them to wait until he put on his breeches, which he did and opened the door, when the defendants entered the house and called for meat, and as the prosecutor was in the act of getting the meat, he was knocked down by one of the defendants, and the store robbed :

Held, to be a sufficient breaking to constitute the crime of burglary: *State v. Mordecai et al.*, 63 N. C., 207.

CARRIERS.

This case must be controlled by that of the *Southern Express Company v. Shea*, 38 Ga., 519, in which it is laid down that "When a common carrier receives and receipts for goods, to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor: *Cohen & Menko v. Southern Express Company*, 45 Ga., 148.

2. The owner of goods can not hold such agents liable on the contract of bailment: *Ib.*

3. When a railroad company, by its agents, takes the fare of a passenger to a particular station on its road, it is bound to stop at that station, that he may get off the cars; it is not sufficient that the speed of the cars be slackened. And if, after passing the station, the speed of the cars is again slackened that the passenger may get off, and, under the direction of the conductor, he does get off, and in so doing gets injured, the company is liable. It is not want of ordinary care, if a passenger prudently uses the means which the company affords him to get off the train: *Georgia R. R. & Banking Co. v. McCurdy*, 45 Ga., 288.

4. If a shipper declines to state the value of the goods when asked by the carrier, it is questionable whether he can recover of the carrier: *Green v. Southern Express Co.*, 45 Ga., 305.

COMMON CARRIER.

Where the cargo of a vessel is damaged in consequence of an accident which results from the falling of the tide, unless it appears that the vessel could not have been so moored as to prevent it being left aground, the owner of the vessel is liable for the damage: *Bohannon v. Hammond*, 42 Cal., 227.

CONSTITUTION.

1. The corporate powers of cities and towns are emanations from the State granted for purposes of convenience, and they are not allowed in the exercise of those powers to contravene the policy of the State, or exceed the powers conferred, and much less those which are either expressly or impliedly prohibited: *Weith & Arent v. City of Wilmington*, 68 N. C., 24.

2. Therefore, where the city of W., in 1862, borrowed money from A. and gave him a bond, which money was used indirectly in aid of the rebellion, and A., before the bond became due, transferred it to B. without notice as to its consideration, and the city, in 1867, by virtue of an act of Assembly, took up the bond and issued to B. in its place other bonds with coupons attached, who afterwards sells the coupon bonds in open market, for a fair price, and without any notice as to the illegality of the original consideration to C. In a suit by C. against the city to recover the coupons on the bonds purchased from B., it was

Held, that C. could not recover, for the reason that all bonds of a like nature had been declared void by the ordinance of the Convention of 1865, and the payment of the same was thereby, and by sec. 13, art. 7 of the Constitution, prohibited, and as being against public policy: *Ib.*

CONSTITUTIONAL LAW.

1. A State has the power, by proper police and sanitary regulations, to exclude from its limits paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons, who are liable to become a public charge, or to admit them only on such terms as will prevent the State from being burdened with their support: *The State v. S. S. Constitution*, 42 Cal., 581.

2. The exercise of such a power is a police or sanitary regulation for preserving the health and morals of the people: *Ib.*

CONTEMPT OF COURT.

The power of a Court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances, and in the manner prescribed by law: *Bachelder v. Moore*, 42 Cal., 415.

CONTRACTS.

1. Duress which will avoid a contract must consist of threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will: *Russell v. McCarty et al.*, 45 Ga., 197.

2. An executory contract for the sale of goods to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party. But where such a contract is executed, an agent employed by his principal to make the contract can recover from him any money he may have advanced in the transaction by his authority, or without his authority, if the principal, after such advance, ratify his agent's act in making it: *Warren, Lane & Co. v. Hewitt*, 45 Ga., 501.

3. Action on a promissory note for \$500, dated Charleston, 17th Jan., 1865, and payable in specie, or its equivalent, "six months after peace is declared between the United States and the Confederate States," with interest "from the day that peace, as aforesaid, is declared." The Circuit Judge instructed the jury that the intent of the parties was that the money should be paid six months after peace was declared between the two belligerents, each acting as a separate and subsisting power, and as that period had not arrived, no cause of action had accrued:

Held, that in this there was error: *Brewster v. Williams*, 2 S. C. (new series) 455.

4. A contract to do a thing "as soon as practicable" implies that circumstances may occur which will delay the completion of it. The word "practicable" can not be understood with regard to the means at the command of the contractors, for they may be entirely inadequate; but in ascertaining what was intended, the nature of the contract, the difficulties to be overcome, and the importance to the other party of an early completion of it, are to be considered: *Reedy v. Smith*, 42 Cal., 245.

CONVERSION.

In an action of trover by a payor against a payee for the conversion of a note for thirty-five dollars, the plaintiff recovered a judgment for one cent damages and costs, which was satisfied by the defendant:

Held, that this did not entitle the defendant to enforce the collection of the note as a valid outstanding obligation against the payor: *Dearth v. Spencer*, 52 N. H., 213.

CORPORATIONS.

1. Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts and engagements made in other States, and the minutes of its Board of Directors may be used as evidence of the acts of the Board, even though the meetings of the Board appear to have been held out of the State chartering the corporation: *The Wood H. H. Mining Co. v. King*, 45 Ga., 34.

2. It is a necessary incident of a mining corporation that it shall have power to contract and to bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or make debts: *Ib.*

3. A corporation which, through its Directors, accepts the services of another as Treasurer, and ratifies and audits his accounts, in which a balance appears against the corporation, is bound by the admission, as a private person would be, under the same circumstances: *Ib.*

4. When the Treasurer of a corporation, with the knowledge and consent of the Directors, raised money for the use of the corporation, on his own credit, paying interest therefor above the legal rate, and his accounts, as Treasurer, were audited and agreed to by the company, of extra interest appearing on the account, and a balance struck and agreed to as due the Treasurer, a verdict of a jury for the balance with legal interest from the date of the account, is not illegal: *Ib.*

5. Where Bolinger and Chambers, the chief subscribers of the "Oroville and Virginia City Railroad Company" paid in the ten per cent. of their subscriptions, required by law to be paid in cash, in a check drawn by Bolinger on the Bank of California, and it appeared that Bolinger had no funds there, but that the check would have been paid if presented:

Held, that such payment was not a payment in cash, as required by law, and that the incorporation, under such circumstances, was invalid, and should be so declared on *quo warranto*: *People v. Chambers*, 42 Cal., 201.

COUNTER CLAIM.

1. A. is sued by the executrix of B., on a note given for the purchase of land sold by the executrix for assets; on the trial A. offers as a set-off a judgment paid by him as B.'s surety:

Held, in administrations granted prior to 1st July, 1869, not to be a counter claim: *McLean v. Leach et al.*, 68 N. C., 95.

2. When a negotiable instrument has been transferred, it becomes affected in the hands of the holder by any equity the obligor may have against such holder, and no subsequent transfer will defeat that equity: *Martin v. Richardson et al.*, *Ib.*, 255.

3. *Therefore*, where A. is indebted by bond to B., who transfers it without indorsement to C., and at the time of such transfer C. owes A. a Bond; after holding it some time C. returns A.'s bond to B. In an action by B. against A. upon the bond due B:

Held, that it was subject to the set-off of C.'s bond to A., though B. may have had no notice of the indebtedness of C. to A.: *Ib.*

COVENANT.

1. In an action for the breach of a covenant of seizin, the general rule that the vendee recovers, as damages, the price paid for the land, with interest from the time of payment, is subject to many modifications, as where his (the vendee's) loss, in perfecting the title, has been less than the purchase money and interest, he can only recover for the actual injury sustained: *Farmer's Bank of N. C. v. Glenn and Wife*, 68 N. C., 35.

2. And if, after the sale to the vendee, the vendor perfects the title, such subsequently acquired title enures to the vendee by estoppel; which, being a part of the title, may be given in evidence without being specially pleaded: *Ib.*

CRIMINAL LAW.

1. There is no case pending, in a prosecution for murder, until after bill found: *State v. Addison*, 2 S. C. (new series), 356.

2. Indictment for murder quashed on the ground that attorneys representing the solicitor, he being absent, had entered the room of the grand jury when they were deliberating on the bill, and advised them in reference to their duty: *Ib.*

3. On appeal from a sentence in a criminal case, where the judgment entry recited that the jury was "sworn to well and truly try the issue joined:

Held, apparent that the oath administered to the jury was not attempted to be set out, and this Court will presume the proper oath was administered: *McNeil v. The State*, 42 Ala., 498.

4. Where, during the trial of a criminal cause, the court, at a recess, gave additional instructions to the jury, received their verdict, and discharged them, in the absence of the prisoner's counsel:

Held, error, when it appeared from the record that no attempt to give them notice was made, but that it would be sufficient notice to call them at the court house door or other place, as witnesses and other persons are usually called: *Ib.*

CRIMINAL PROCEEDINGS.

The fact that a juror is not resident of the county in which the indictment is tried, is a good ground of challenge, but not for a new trial after a verdict is rendered: *State v. White*, 68 N. C., 158.

DEDICATION.

1. When the owner of a tract of land lays it off for a town, publishes a map of the lots, streets, and lanes, and sells out the lots on a street to others, and the town is established as designated in the map, the owner of the land will be presumed to have dedicated the streets and lanes to the public, and if one of them be diverted from the purposes designated, as if under a sale from the city authorities a house be built on land that is part of the street, this does not authorize the original owner of the tract to sue in ejectment for the land so built upon. The title of the land is in the public, for the uses designated, so long as the town exists. If the street be abandoned by the public, *prima facie*, the reversion would be in the owner of the abutting lots, unless the injured grantor had in express terms reserved the right to himself in his deed conveying the lots, or in his act of dedication: *Bayard v. Hargrove et al.*, 45 Ga., 342.

2. It is one of the essential elements of a good dedication that it shall be irrevocable, and that the land shall be forever dedicated for the public use which is designated, provided the public see fit to use it for that purpose. A reservation of the right to revoke the dedication, defeats the dedication: *San Francisco v. Canarar*, 42 Cal., 543.

3. An acceptance of a dedication is generally established by a use by the public of the land for the purpose to which it has been dedicated. Until accepted, the dedication, whether made by deed or otherwise, may be revoked by the owner of the land: *Ib.*

4. The public use, necessary to constitute an acceptance of the dedication, must be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked and the use by the public discontinued: *Ib.*

DEED.

1. A paper in writing, not under seal and unregistered, which has been surrendered to the grantor by the alleged grantee, prevents any title resting in the grantee. And such paper writing, passing no title, could do no more than raise an equity which the grantee had a right to surrender, unless it was done to defraud creditors: *Wough v. Blevins*, 68 N. C., 167.

2. A deed from a Clerk and Master in Equity conveys the legal title, and its validity can not be attacked in a collateral way, as for instance, in an action of ejectment. To avoid such a deed it is necessary that proceedings in the nature of a bill in equity should be instituted, and a decree obtained declaring its validity or invalidity: *Simmons v. Hassell et al.*, *Ib.*, 213.

3. A mortgage of land contained a power authorizing the Sheriff, in case default of payment should be made to sell the land to the highest bidder, make him title and satisfy the mortgage debt out of the proceeds of sale. Default was made, and the Sheriff sold the land, and made a deed of conveyance to the purchaser in his own name, reciting therein that he sold by virtue of the power given by the mortgage:

Held, that the deed did not transfer the estate of the mortgagor to the purchaser *Webster v. Brown & Hammett*, 2 S. C. (new series), 428.

4. A deed made under a power of attorney, must be executed and delivered in the name of the principal: *Ib.*

DEVISE.

Where a devise of real estate is void by the rules of law, the land descends to the heirs-at-law of the testator, and does not pass to the residuary devisee. But where a bequest of personal property is void, the property passes to the residuary legatee. *Deford v. Deford et al.*, 36 Md., 168.

DEVISEES.

Devisees of an insolvent testator are not liable to creditors of the estate for rents and profits during their possession before sale: *Kinsler v. Holmes*, 2 S. C. (new series), 483.

DISTRIBUTION OF ESTATES.

Where there was a settlement between one of the executors of an estate and the legatees, in which there was turned over to the legatees a note of the executor, with a third party as security, as a part of the assets of the estate, and at the same time the executor gave to the legatees his individual note for the balance in his hands, and there was a distinct understanding that the last note was only given as evidence of the amount due, and that the executor was to be liable, as executor, for the amount of the same:

Held, that the last note was still a trust debt, and entitled to priority in the distribution of assets, but the first was not: *Latimer v. Sayre*, 45 Ga., 468.

DIVORCE.

Where the wife's earnings are sufficient for her support, and they are not interfered with by the husband, the neglect of the husband to provide the common necessities of life for the wife is not sufficient ground for a divorce, although the husband be a good workman and able to earn enough to support the wife: *Rycraft v. Rycraft*, 42 Cal., 445.

DOWER.

Where a purchaser of land gives to the vendor, at the time of the purchase, and as part of the same transaction, a mortgage of the land, his widow is not entitled to dower therein until the whole mortgage debt be paid; and it makes no difference that only part of the debt was incurred for the purchase money of the land: *Calhoun v. Calhoun*, 2 S. C. (new series), 283.

EJECTMENT.

1. Where A., by his will, devised a tract of land to be sold and the proceeds to be divided between B. and C., and appointed B. his executor, and B. proved the will and took out letters, and went into possession of the premises, A. having lived thereon at his death, and B. afterwards died,

Held, That in an action of ejectment, brought by the administrator *de bonis non* of A. against the widow of B. and his administrator, the defendants were estopped from setting up title in B., acquired previously to the death of A. Whether the title is good or bad, the defendants can not set up a title adverse to that under which B. got possession of the premises: *Benjamin et al v. Gill*, 45 Ga., 698.

2. Where land is devised to B. and C., and the testator, after making his will, conveys the land by deed to B., whom he appoints his executor, and who qualifies as such after the death of testator. *Query*, whether B. is estopped from denying that the land passed by the will: *Ib*.

EQUITY.

1. The Statute of Frauds requires that any contract for the sale of lands or any interest in or concerning them, must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized; but the Statute of Frauds does not extend to cases where the contract has been fully executed, or where there has been performance on one side, accepted by the other, in accordance with the contract: *Raulins v. Shropshire*, 45 Ga., 182.

2. Equity will reform a marriage contract, after the death of the husband, at the instance of his child by a former marriage, if it is made plainly to appear that at the time of the second marriage, it was agreed between the parties that the property of each should be settled on its owner for life, with remainder to the children of such owner by a former marriage, but the draftsman of the contract omitted to insert the provision as to the husband's property, and both parties signed under the impression that it was inserted: *Burge et al v. Burge*, 45 Ga., 301.

3. Equity will grant relief against a mistake by which parties, through their own ignorance or inattention, fail to select or prepare a proper kind of instrument to effectuate their agreement and intention, the same as if such mistake were made by a scrivener: *Russell v. Mixer*, 42 Cal., 475.

4. It is well settled, that in an action at law for the conversion or non-delivery of personal property agreed to be delivered, interest may be awarded by way of damages for a breach of the contract; and there are even more cogent reasons why equity should adopt the same rule in the settlement of a long standing account: *Pujol v. McKinlay*, 42 Cal., 559.

5. Where a lessee, having redeemed property leased from an execution sale and received the sheriff's deed recovered in ejectment against the lessor, but it appeared as a matter of fact the lessee, in making such redemption, did it in trust for the lessor:

Held, That although at law the lease was merged in the lessee's new title and recovery in ejectment, in equity there was no merger; and that on settlement of accounts the lessee was chargeable with rents during the whole time: *Ib*.

EQUITY JURISDICTION.

Where a trustee dies before the completion of his trust, and the ascertainment of his indebtedness to the trust estate, a court of equity will entertain a bill filed against the sureties on his bond, by his successor in the trust, and will decree the payment by the sureties of the amount found to be due to the trust estate: *Thurston v. Blackiston*, 36 Md., 501.

EQUITY PLEADING.

The objection of multifariousness to a bill in equity, must be confined to cases where the demand against each particular defendant is entirely distinct and separate, in the subject-matter, from that in which other defendants are interested, and does not apply where there is a common liability in the defendants, and a common, although not a co-extensive, interest in the complainants: *Fiery et al v. Emmert et al*, 36 Md., 464.

ESTOPPEL.

1. In an action for false representation, by which the plaintiff was damaged, if the representation be by deed, so that the defendant is estopped from denying the fact, he may yet show that the plaintiff knew the truth, for the purpose of fixing a time when the right of action accrued and the Statute of Limitations commenced running against the plaintiff's claim, it appearing that the plaintiff was seeking to avoid the statutory bar by showing that he had not discovered the fraud until long after the same was committed: *Cade v. Burton et al*, 45 Ga., 456.

2. In an action of assumpsit brought to recover damages for a breach of warranty in the sale of a lot of cotton, it appeared that the plaintiff had pleaded the facts upon which his right of action depended in defense, *pro tanto*, of a suit brought against him for the price of the cotton, by the present defendants in Massachusetts; that he afterwards suffered judgment to go against him by default in that suit, offering no evidence in support of his plea.

Held, That he was not estopped by the record and proceedings in Massachusetts from maintaining the present action: *Bascom v. Manning et al*, 52 N. H., 132.

EVIDENCE.

1. There is an exception to the general rule against hearsay evidence, by which a matter of general interest to a considerable class of the public, may be proved by reputation among that class; therefore, it is competent for a witness to state the price of cotton, from information received through commercial circulars, prices current and correspondence and telegrams from his factor: *Smith & Melton v. N. C. R. R. Co.*, 68 N. C., 107.

2. The by-laws of a corporation are not evidence for or against strangers who deal with it, unless brought home to their knowledge and assented to by them: *Id.*

3. In an action to recover for work or labor, the plaintiff claimed that, by the original contract of hiring, he was to work "so long, and so long only, as he chose." The defendants claimed that the hiring was for a specified time; and it appeared that the suit was commenced before the expiration of that time.

Held, That evidence to show the extent of damage occasioned the defendants by the plaintiff's leaving their employ before the expiration of the term of service claimed by them was properly excluded: *Blodgett v. Berlin Mills*, 52 N. H., 215.

4. A breach or failure of performance by the employee of the original contract of hiring may be shown by the employer in defense, *pro tanto*, to an action against him for the wages, under the general issue: *Id.*

FACTORS.

Where a factor receives his principal's money and retains it without giving notice to the principal, until the currency in which it was received, becomes worthless, he can not relieve himself from liability for the loss by showing, merely, that he was not in default in an unreasonable detention of the money; he must, also, show that

it remained in his hands as the property of the principal. If he mixes it with his own money, or uses it in his business, he is liable therefor: *Pinckney v. Dunn*, 2 S. C. (new series), 314.

FIRE INSURANCE.

1. Where the preliminary proofs of the loss by fire of property insured are furnished to the insurance company within a reasonable time, and no objection is then made to such proofs or to the absence of a certificate required of the insured by a condition of the policy, and the insurance company months afterwards refuses to pay the loss under the policy upon other and distinct grounds and at the time of such refusal makes no objection to the proofs of loss, or to the absence of the certificate, it will be estopped in an action on the policy, to sit up and rely upon such objections, notwithstanding the policy provides that "nothing but a distinct specific agreement, clearly expressed and indorsed on the policy, shall operate as a waiver of any printed or written condition, warranty or restriction therein: *Franklin Fire Insurance Co., of Baltimore v. Chicago Ice Co.*, 36 Md., 102.

2. A person having goods in his possession as consignee, or on commission, may insure them in his own name, and, in the event of loss, recover the full amount of insurance, and, after satisfying his own claim, hold the balance as trustee for the owner: *Hough, &c. v. Peoples' Fire Ins. Co.*, 36 Md., 398.

GUARDIAN AND WARD.

1. A guardian in good faith sold, on a credit of twenty days, the cotton of his wards, taking from the purchaser his note without security for the price of the cotton, the purchaser being at the time of the sale solvent, and the owner of real estate, but before the note was collected became insolvent and unable to pay the note:

Held, that the *bona fides* being established, he was not liable to his wards for failing to collect the amount for which the cotton sold: *State ex rel, Lawrence v. Morrison, Adm.*, 86 N. C., 162.

2. Where a guardian sends his wards to a school, the charges for board, tuition, &c., will, in the absence of a special contract to the contrary, be upon his individual responsibility, but where in a suit against the guardian for such board, tuition, &c., the answer of the defendant denies his individual liability, and alleges that the credit was given by the plaintiff to the estate of his wards in his hands, an issue of fact is raised as to the individual liability of the guardian, which must be submitted upon the evidence *pro* and *con* to the jury for their determination: *Salem Female Academy v. Phillips*, 491: *Ib.*

3. When a guardian uses the funds of his wards in the purchase of a tract of land, they can follow the land to enforce the payment of the amount due them, and nothing can divest their right to do so except the exercise of their own free wills after coming of age, or the decree of some Court of competent jurisdiction: *Younce and wife v. McBride*, 532: *Ib.*

4. When a guardian subsequently became trustee, there is no presumption of law that he ceased to hold the fund as guardian as soon as he became trustee: *State ex rel., Jones v. Brown*, 554: *Ib.*

5. When a guardian received a note in settlement from a former guardian which had no surety, but the maker was solvent, although the taking of the bond without security was negligence in the former guardian, and although the subsequent guardian was not obliged to take it, yet after he had taken it, the former guardian is discharged: *Ib.*

6. Where shares in an insurance company belong to an infant, but were issued to his guardian, under the name of "Augusta R. Josephi, Guardian," and she after-

wards, in the same name, but without any order of the Probate Court, sold and assigned them :

Held, that such sale was void, and that the purchaser could not require the company to recognize him as having any title to such stock: *De LaMontague Union Ins. Co.*, 32 Cal. 291.

7. Every alienation of the property of a ward by a guardian, if made without an order from Court, is void; and it is of no import whether the purchaser has knowledge that it belongs to the ward or not: *Ib.*

GUARANTY.

1. Defendants signed a letter, addressed to F., as follows: "As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guaranty the payment of any bills which you may make, under this letter of credit, in Baltimore, not exceeding, in the whole, fifteen hundred dollars: "

Held, that any party advancing goods to F. upon the faith of the promise contained in the letter, could maintain an action thereon against the defendants as guarantors: *Griffin v. Rembert*, 2 S. C., (new series) 410.

2. A party may maintain an action on a written agreement, within the fourth section of the Statute of Frauds, though his name does not appear therein. The fact that he became a party to the agreement may be shown by parol: *Ib.*

HABEAS CORPUS.

A prisoner who has been convicted of murder, and sentenced to be executed, will not be discharged on *habeas corpus*, because the Sheriff has permitted the day assigned for the execution to elapse. A new day will be assigned. *Ex parte Nixon*, 2 S. C., (new series), 4.

HUSBAND AND WIFE.

1. Where the point in issue in a case was whether a deed, directed by a husband to be made to his wife, inured as a gift to her or not:

Held, that it was for the Court to decide upon the husband's intentions from his acts and conduct at the time; and that a question to him, as to what his intentions had been, was properly excluded as immaterial: *Woods v. Whitney*, 42 Cal., 361.

2. If a husband, who is free from debt, purchase property with community funds and direct the conveyance to be made to his wife, with intent to make it her separate estate, the deed will take effect as a gift; and if the conveyance be on its face an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts, in order to rebut the presumption that it is common property: *Ib.*

3. Husband and wife, in 1869, contracted to sell the land devised to the wife in 1855, and jointly covenanted to make title when the purchase money was paid, the purchaser giving bonds payable to the husband alone for the purchase money:

Held, to be error in the Court below to condemn this debt owing to the purchaser of the lands to the payment of a debt due from the husband:

Held, further, that the wife was entitled to be heard on motion, in the proceedings supplemental to execution, instituted to subject the debt owing for the land to the payment of a debt owing by the husband: *Williams v. Green*, 68 N. C., 183.

ILLEGALITY.

Where judgment was obtained at common law against the makers and indorsers of a note, and an appeal entered which was afterwards dismissed, and subsequently the indorser is again sued on the note and permits a judgment to be taken against him by

default, he can not, by affidavit of illegality, attack such second judgment on the ground that a prior judgment, unreversed, existed against him for the same debt. He should have made this defense to the second action: *Lewis v. Armstrong et al.*, 45 Ga., 131.

INFANT EN VENTRE SA MERE.

An infant *en ventre sa mere* is to be deemed *in esse* for the purpose of taking a remainder, or any other estate or interest which is for his benefit: *Chrisfield et al. v. Storr*, 36 Md., 129.

INJUNCTION.

1. An injunction will lie, at the suit of the proprietor, to restrain a municipal corporation from opening a new street on his land, and collecting a sum of money out of him, assessed as his benefit of the proposed improvement, and his contribution to the cost of opening the street, when the proceedings of the corporation appear to be regular, and their invalidity is to be shown by extrinsic evidence: *Miller v. Mayor, etc.*, of Mobile, 47 Ala., 163.

2. Equity will not interfere to restrain a trespass, unless it affirmatively appears that the damage will be irreparable, or, from the insolvency of the trespasser or other cause, the remedy at law is incomplete: *Seymour v. Morgan*, 45 Ga., 201.

3. When A., a school teacher, was induced by B., another school teacher, to purchase of B. the lease of an academy, under inducements held out by B. that, if he could sell, he would quit teaching in the locality, and on these inducements the purchase was made:

Held, that equity will enjoin B. from teaching school in the locality during the lease: *Spier v. Landin*, 45 Ga., 319.

INSOLVENT DEBTOR.

An insolvent debtor, in a deed made by him, may prefer one creditor to another, if he does it *bona fide* and with no fraudulent intention. Such a preference being fraudulent and void only in case proceedings to have the debtor adjudicated a bankrupt are commenced within six months afterwards: *Hislop v. Hoover*, 68 N. C., 141.

INSURANCE.

1. An insurance company is not bound by any private arrangement entered into by their agent, acting without the knowledge or authority of the company in respect to the payment of a premium on a policy of insurance. Especially is this so when the company, instead of affirming the action of the agent, gives notice to the assured to "pay his note when due and save his policy:" *Ferebee v. N. C. Home Ins. Co.*, 68 N. C., 11.

2. Although an insurance company may waive the right to declare a policy void, for the reason that a note given for cash premium is not paid at maturity, still such waiver does not preclude the company from insisting upon a condition contained in the policy declaring it void in case of loss or damage by fire, if the note so given, or any part thereof, shall remain unpaid and past due at the time of such loss or damage: *Ib.*

3. An insurance company that reserves to itself the right to cancel its policies upon return of the unearned premium, must pay or tender such premium to the assured before it can relieve itself of liability on the policy. Notice of its intention to cancel, with mere announcement of its readiness to pay, is insufficient: *Hollingsworth & Morague v. The Germania and other Insurance Companies*, 45 Ga., 291.

4. Surrender of the policy for cancellation prior to the loss, and subsequent pay-

ment of the unearned premium to the assured, and acceptance by him, after destruction of the property insured, both parties being ignorant of the loss, will not release the company from liability: *Ib.*

JUDGMENT.

1. Judgments void or irregular by reason of some informality, will be set aside only at the instance of a party to the action who is prejudiced by it: *Herrey & Co. v. Edmunds*, 68 N. C., 243.

2. Judgments void for want of jurisdiction in the Court, if such appears on the record, may be collaterally impeached in any Court in which the question arises. Such judgments may be avoided and stricken from the record of the Court, *ex mero motu*, or at the instance of any person interested in having it done: *Ib.*

3. A judgment of a Circuit Court of this State, rendered on 3d September, 1866: during the existence of the provisional government, founded upon a summons issued from a rebel Court in this State on the 8th day of February, 1861, and served upon the defendant by the rebel authorities, though such judgment be taken by default, is not a nullity: *Bush v. Glover*, 47 Ala., 167.

4. A sale of lands made by the Sheriff under authority of an execution issued on such a judgment, and regularly conducted, is valid, and the Sheriff's deed conveys to the purchaser such title as could pass by the sale: *Ib.*

5. Where a single defense was interposed to an action, and such defense was supported by a decision of the Supreme Court, which, however, was afterwards reversed:

Held, that judgment should not be rendered on the record, but the cause remanded for further proceedings: *Thomasson v. Wood*, 42 Cal., 417.

6. In order to maintain a judgment on the merits, directly attacked as on appeal therefrom, it is requisite that the record should show that the Court had jurisdiction of the person against whom the judgment was rendered, and that such judgment was warranted by the pleadings of the party in whose favor it was rendered; and in determining these questions recitals in the judgment can not be regarded: *McKinlay v. Tuttle*, 42 Cal., 571.

7. Lapse of twenty years, with other circumstances:

Held, To raise the presumption that a judgment was satisfied, although during five of the twenty years the stay law was of force and war existed: *Kinsler v. Holmes*, 2 S. C. (new series), 483.

JURISDICTION.

A co-ordinate tribunal may not disregard, much less set aside, the judgment of another Court, for mere errors of judgment or irregularities of procedure; but where the Court is without jurisdiction its judgment is void, and must be so held whenever it comes before another Court: *Ib.*

LANDLORD AND TENANT.

1. A lease for a specified period of time, as for one month, creates an estate substantially different from that created by a lease for an indefinite period, with rent payable monthly, or by a lease from month to month. Where the time is specified, the lease terminates by the mere lapse of time. No notice is necessary to entitle the landlord to re-enter, or to enable him to recover possession. But where the lease is from month to month, the lease does not terminate by mere lapse of time—neither party can terminate the relation without notice to the other in advance: *Stoppelman v. Mangot*, 42 Cal., 317.

2. A tenancy for the specified period of one month is a tenancy for years, and not a tenancy from year to year, or from month to month: *Id.*

3. Where the relation of landlord and tenant exists, and through failure of the landlord to take the necessary steps, as provided by law, to terminate the tenancy at its expiration, and summarily eject the tenant holding over, the tenant has acquired the right to continue the tenancy at sufferance, or for another year. A Court of Equity will not intervene and oust him because he is a bad manager, or is vicious and disagreeable to his landlord, or is insolvent: *Blain v. Everett et al.*, 38 Md. 73.

4. Covenant on a lease for seven years, from 1st July, 1859. The rent which had accrued up to the 1st of April, 1862, had been paid, and the action was against the lessee to recover so much of the rent as had accrued from that day until the end of the term. The defense was that the defendant had been deprived of the beneficial use and enjoyment of the premises, according to the intent of the lease, from and after the 1st of April, 1862, by the casualties of war, but it was no part of the defense that the defendant had surrendered, or offered to surrender, the lease, or otherwise rescind the contract, and it was in evidence that he used and occupied the premises after the close of the war, in 1865, until the end of the term:

Held, that the defense set up was insufficient to relieve the defendant from the plaintiff's claim: *Coogan v. Parker*, 2 S. C. (new series), 255.

5. A purchaser of land can not plead an outstanding title, adverse to that of his vendor, so long as his possession is undisturbed, unless he set up some distinct equity, showing that his remedy on the warranty be inefficient: *Smith v. Hudson*, 45 Ga., 208.

LEGACIES.

Lands specifically devised will not be charged with the payment of a pecuniary legacy where no motive existed which could have influenced the mind of the testator to create the charge, and there is nothing in the will that can be laid hold of for that purpose: *Rosborough v. Rulland*, 2 S. C. (new series), 378.

LEGISLATIVE ENACTMENT.

Every substantial part of a proposed enactment is a "Bill," within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes law: *State v. Platt*, 2 S. C. (new series), 150.

LIEN.

1. A title derived under a lien elder in its origin is *prima facie* superior to a title from a common source, purporting to be derived under a lien junior in point of time, though the judicial sale under the latter may have preceded the sale under the former: *Littlefield v. Nichols*, 42 Cal., 372.

2. If A. makes a verbal contract with B. to sell him a tract of land, and B. goes into possession, B.'s judgment creditors acquire no interest in the land except a lien on his interest to be enforced by sale on execution: *Logan v. Hale*, 42 Cal., 645.

3. The rule that a creditor having a lien on two funds may be compelled to resort, in the first instance, to the one on which the subsequent claim of another does not attach, is never applied where injustice may be done to the prior creditor, as, for instance, where the fund to be resorted to is dubious, or is one which can be reached only by litigation: *Walker v. Covar*, 2 S. C. (new series), 16.

LIMITATION OF ACTIONS.

1. In an action by Hill, to recover one-half his advances made under a contract between him and Haskin, whereby they agreed to buy and sell on joint account cer-

tain mining stock, Hill to advance all the money and Haskin to repay one-half with interest, and Hill to hold all the stock purchased as security for his advances, but without specifying any time within which the re-payment was to be made.

Held, That an offer to account and a demand for re-payment by Hill were conditions precedent to his right to maintain the action, and that the Statute of Limitations would not commence running against him until such offer and demand: *Hill v. Haskin*, 42 Cal., 159.

2. The expiration of time fixed in the Statute of Limitations with reference to actions for money due on contracts, does not discharge the debt or extinguish the right, but only takes away the remedy: *Sichel v. Carrillo*, 42 Cal., 493.

3. Where a promissory note is executed by one person, and a mortgage to secure the debt is given by another, and the payor of the note dies, and the holder thereof fails to present either the note or mortgage to his administrator for allowance within ten months after publication of notice to creditors, although the claim is barred as against the estate, yet the mortgage remains in full force as against the the mortgagor and the mortgaged property, and may be foreclosed at any time before it is barred, as against the mortgagor, by the Statute of Limitation: *Ib.*

4. The above rule remains the same when the note is made by the husband for his own debt, and the wife mortgages her separate property to secure it, and the husband signs the mortgage to show his assent to it. In such case the wife's liability on the mortgage is not affected by the death of the husband and the failure of the holder to present the claim for allowance to the administrator of the estate: *Ib.*

LIMITATIONS OF ESTATES.

1. Testator devised to his son G., "for and during his natural life, the rents, issues, uses, occupation and enjoyment of" certain lands, and from and after his death "unto the issue of" G., "living at the time of his death, who attain the full age of twenty-one years, or die before that time, leaving lawfully begotten issue who shall attain the full age of twenty-one years, living at the time of the death of the said" G., with cross remainders among the issue, and with a limitation over to the testator's "right heirs" in case there should be a failure of all such issue. G. died leaving issue.

Held, That the issue took vested remainders, liable to be divested in the event of their dying under the age of twenty-one years: *Seabrook v. Gregg*, 2 S. C. (new series), 68.

2. The court will always hold a remainder to be vested rather than contingent, when it can do so consistently with the intention apparent in the terms of the limitation: *Ib.*

MANDAMUS.

1. A railroad company, chartered by the State, is so far a public corporation that its officers owe duties to the public, which they may be compelled to perform, by writ of mandamus, and among them are their duties relative to the capital stock of the company and their control of the transfer thereof: *State v. McIver*, 2 S. C. (new series), 25.

2. Where the stock sought to be transferred is owned by a corporation whose directors, being vested with the necessary power to that end, authorize its President to sell it, a contract of sale by him shows a sufficient legal and equitable title in the purchaser to entitle him to the writ of mandamus to compel the officers to transfer the stock to him: *Ib.*

3. It is no ground of objection to the issuing of a writ of mandamus to compel

the transfer of stock, that the purchasers have joined with the sellers in the application for the writ: *Ib.*

4. Though it be true that mandamus will not lie, unless the duty to be performed is one in which the public have an interest, and not even then, where the party demanding the writ has another plain and adequate remedy, yet the duty of the officers of a railroad corporation to permit the transfer of its stock, is one in which the public has a sufficient interest to warrant the court in issuing the writ of mandamus to compel its performance, and the remedy by action against the officers of the corporation to recover damages for their refusal to permit the transfer is too doubtful and uncertain in its character to supersede the specific and speedier remedy by mandamus: *Ib.*

MARRIAGE OF SLAVES.

A marriage of slaves is made valid by the ratification of the parties after they become free: *Jones, Adm'r, v. Jones et al*, 36 Md., 417.

MEASURE OF DAMAGES.

In the assessment of damages to the owners of property, caused by the location and use of a railroad, the actual damage resulting directly from an invasion of their rights of property by the railroad company, is the measure of damages to be rendered: *The Selma, R. & D. R. R. Co. v. Camp*, 45 Ga., 180.

MECHANIC'S LIEN LAW.

1. In order to give a mortgage to secure advances, priority over a mechanic's lien, the mortgage must be recorded before the building is commenced: *Brooks v. Lester et al*, 36 Md., 65.

2. The commencement of a building under the mechanic's lien law, is the first labor done on the ground which is made the foundation of the building, and is to form part of the work suitable and necessary for its construction: *Ib.*

MORTGAGE.

1. Where a deed absolute on its face is given of a tract of land, and at the same time the grantee makes to the grantor a defeasance, agreeing to sell the grantor the land, if he pays the sum fixed by a certain time, the test by which to determine whether the transaction is a mortgage or a defeasable sale is the fact whether or not, notwithstanding the conveyance, there is a subsisting, continuing debt from the grantor to the grantee: *Farmer v. Grose*, 42 Cal., 169.

2. Where Morris and Angle owned a lot of sheep, and Morris executed a bill of sale of his half to Angle, who was in possession, in consideration of the surrender to him of his own note, previously given to Angle, and the giving to him of Angle's note for the balance; and Angle at the same time agreed in writing to sell back to Morris at a future time, on payment of the money represented by the notes.

Held, That the transaction constituted an absolute sale, and not a mortgage: *Morris v. Angle*, 42 Cal., 239.

3. A creditor of a mortgagor not having acquired a lien upon the mortgaged goods, by attachment or other valid legal process, will not, in an action against him by the mortgagee for wrongfully and illegally seizing the mortgaged property, be permitted, merely because he is a creditor of the mortgagor, to impeach the mortgage as fraudulent as against creditors, either as a defense to the action, or in mitigation of damages: *Wanamaker v. Bowes*, 36 Md., 42.

MUNICIPAL CORPORATION.

1. The power of the Legislature to appropriate the moneys of municipal corporations in payment of claims, ascertained by it to be equitably due to individuals, though such claims be not enforceable in the courts, depends largely upon the legislative conscience, and will not be interfered with by the judicial department, unless in exceptional cases: *Creighton v. San Francisco*, 42 Cal., 449.

2. The circumstance that the contract, under which Patrick Creighton did certain street work in San Francisco, expressly provided that the city should in no event be liable for any portion of the expenses thereof.

Held, Not to affect or in any manner invalidate the special Act subsequently passed by the Legislature (Stats., 1869-70, p. 309), requiring the city to pay him: *Id.*

3. In reference to proceedings of statutory creation for the improvement of certain streets in San Francisco:

Held, That it was competent for the Legislature by subsequent enactment, to cure any defects or omissions in the proceedings of the Board of Supervisors or Superintendent of Streets: *San Francisco v. Certain Real Estate*, 42 Cal., 517.

4. Municipal corporations are but subordinate subdivisions of the State Government, which may be created, altered, or abolished, at the will of the Legislature, which may enlarge or restrict their powers, direct the mode and manner of their exercise, and define what acts they may or may not perform, subject, however, to the limitation that the Legislature can not direct the performance of an act which will impair the obligations of a contract: *San Francisco v. Chanana*, 42 Cal., 541.

5. A declaration by one against an incorporated city, alleging that said city had, by an ordinance, prohibited the erection of wooden buildings in certain parts of said city, and that afterwards the City Council had authorized B to build a wooden building within said limits, and that B's building, taking fire, had caused a building belonging to plaintiff to be burned, is demurrable: *Forryth v. The Mayor and C. of Atlanta*, 45 Ga., 152.

NOTICE.

A. mortgaged to B., shares in the Stewarts-town bridge. The mortgage, not being sworn to or recorded as prescribed by statute, was invalid as against attaching creditors without notice. C, a creditor of A., having no notice of the mortgage, commenced the levy of an execution on the shares. At the Sheriff's sale, under C's execution, the shares were sold, "subject to all legal claims on said bridge," to D., who, at that time, had notice of the mortgage:

Held, that D. took the shares unincumbered by the mortgage: *Riper vs. Hilliard*, 52 N. H., 209.

OFFICIAL BONDS.

The refusal of a Sheriff to pay back, on demand, money received through a mutual mistake, in excess of true amount of an execution collected by him, is a private matter to be settled between the parties, and is not a breach of his official bond, for which his sureties can be held responsible: *State ex rel. Ireland v. Tapscott, et al.*, 63 N. C., 300.

OFFICERS AND OFFICE.

1. The offices of Mayor and Aldermen of an incorporated city or town are public political offices, and the power vested in them is political in its nature: *Alexander McKenzie*, 2 S. C., 81.

2. In the absence of any constitutional inhibition, political officers are subject to the entire control of the Legislative power of the State, which may, at its mere will and pleasure, abolish the offices themselves, or change the tenure by which they are held, or remove the officers and put others in their place with or without election: *Ib.*

3. A political officer does not hold by contract, in the sense of the Constitution, nor has he any vested right of property, in a constitutional sense, in the office, or in the salary thereof, before he has earned it: *Ib.*

4. Political powers always enure to the beneficial use of the political community, as such, exclusively, and are revokable at the mere will of the government communicating them: *Ib.*

ORDINARY CARE.

1. Ordinary care is such care as is usually exercised under like circumstances by persons of average prudence: *Sleeper v. Sundown*, 52 N. H., 241.

1. Whether it is want of ordinary care for a blind man to travel upon the highway on foot, unattended, is a question of fact to be determined by the jury in view of the circumstances of each individual case: *Ib.*

3. Where a blind man, in the daytime, walked off the side of an unobstructed bridge, sixteen feet in width, which was defective for want of a rail, and suffered an injury which would not have happened but for his blindness, the court can not say, as matter of law, that his fault contributed to the accident; but it is for the jury, after considering his familiarity with the road, his ability arising from the increased acuteness of his other senses, or otherwise, and all the circumstances of the case, to say whether he was guilty of carelessness in attempting to pass the bridge without a guide: *Ib.*

PARTNERS AND PARTNERSHIPS.

Notes executed or indorsed by one partner in the name of the firm, after a dissolution of the partnership, of which no notice was published, are binding on the partners, in the hands of strangers who received them for value, in the regular course of business, without actual knowledge of the dissolution: *Taylor v. Hill, et al.*, 36 Md., 494.

PAYMENT.

1. A bank can not, by assignment of its effects, choses in action, &c., deprive a maker of a note due the bank of his right to pay the same with the bills of the bank; nor can the bank, by any authority derived from the Legislature, deprive the maker of such right of payment of a note due the bank in bills of the bank: *Blount, Com'r. v. Windley*, 68 N. C., 1.

2. A voluntary payment, with a knowledge of all the facts, can not be recovered back, although there was no debt; a payment, under a mistake of fact, may: *Adams v. Reeves, et al.*, *Ib.*, 134.

3. P. furnished W. with money to pay for a piece of land, and took a deed thereof in his own name, with the understanding that he would convey the premises to W. upon being paid the amount of his advances with interest, and for his trouble. Afterwards, at a general settlement of all matters of dealing between the parties, P. claimed that he furnished the money to make a certain payment of \$300 on the land, which W. denied. P. refused to convey the land except upon payment of said sum of \$300, and W., in order to get a deed, finally yielded to the claim, and paid the sum demanded:

Held, that W. could not recover back the money paid under these circumstances,

even though the sum in dispute was not, in fact, furnished by P., according to his claim: *Pearl v. Whitehouse*, 52 N. H., 254.

PENALTY.

1. As a general rule, a sum of money in gross, stipulated to be paid for the non-performance of an agreement, is considered as a penalty or security for the payment of such damages as the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will be incumbent on the party who claims to recover the sum as liquidated damages, to show that they were so considered and intended by the contracting parties: *Davis v. Gillett*, 52 N. H., 126.

2. A. by his bond, acknowledged himself to be "holden and firmly bound" to B. "in the sum of one thousand dollars." The condition of the bond was that A. should not engage in a specified business within a certain time and place:

In the absence of any evidence concerning the intention of the parties, it was held that the sum of one thousand dollars was to be regarded as a penalty, and not as liquidated damages: *Ib.*

PRACTICE.

1. Whether or not there was a spoliation of a deposition offered in evidence, is a question for the Court, to be decided upon inspection, and it is error to submit the same to the decision of the jury: *Stith v. Lookabill*, 68 N. C., 227.

2. On the trial of an action upon a note due an intestate, his administrator was introduced and asked what his intestate said about the note before his death. Question ruled out. Defendant's counsel argued to the jury, that if the intestate was alive he would be willing to leave the decision of the case with him, &c. In reply the plaintiff's counsel had a right to comment before the jury upon the objection of the defendant to the introduction of the declarations of the intestate: *Chambers Adm'r, v. Greenwood*. *Ib.*, 274.

3. The taking and reporting an account by the Master, or Clerk, to whom the Court has referred it, involves the exercise of the judgment and discretion of such referee which he can not delegate to another. And it is no proper exercise of his judgment and discretion when he simply adopts an account which has been stated by another, whether the account so adopted has been taken in the same suit, or in some other. *Larkins et al. v. Murphy et al.* *Ib.*, 381.

4. A defendant who has appealed has no right to withdraw his appeal without the consent of the plaintiff: *Tommey & Stewart v. Finney*, 45 Ga., 155.

5. When the witness of one party has been examined by both sides, and has left the stand, the other party has no right to recall him, that he may cross examine him upon a fact stated. If he pleases he may recall and examine him as his own witness: *Gavan v. Ellsworth*. *Ib.*, 283.

6. An indorsement by defendants on the *sub. ad res.*, that they accepted service thereof, admitted the truth of the statements of the bill, and consented to the prayer thereof, will not be regarded as an answer, nor have the effect of one: *Charles v. Coker*, 2 S. C. (new series), 122.

PRESCRIPTIVE RIGHT.

1. Merely maintaining a dam for twenty years does not give a pre-ccriptive right to flow land as high as it can be flowed by that dam. To acquire such right the water must be actually raised on the adjacent owner's land so often as to afford him reason-

able notice, during the entire period of twenty years, that the right is being claimed against him.

2. In order to gain a prescriptive right of flowage, it is not enough that the adverse user has been co-extensive with the wants of the party claiming the right. The acts of user must be of such a nature and of such frequency as to give reasonable notice to the land-owner that the right is being claimed against him: *Gilford v. The Winipisogee Lake Co.*, 52 N. H., 262.

PRINCIPAL AND AGENT.

1. The declarations of an agent are not admissible to bind the principal until the agency is established; but where there is evidence of agency, although not full and satisfactory, such evidence should be submitted to the jury, who are the exclusive judges of its weight: *National Mechanics' Bank of Baltimore v. National Bank of Baltimore*, 36 Md., 5.

2. It is not the province of the Court to determine the question of agency *vel non*; but to decide whether there is any evidence tending to prove agency: *Ib.*

3. The defendant and others, a committee of the town of Keene, to make improvements in and about a certain pond for the purpose of supplying the citizens of Keene with water, found it necessary to clear off a strip of land about the margin of said pond, which land the town of Keene had purchased for that purpose, and the committee had left to one Nourse the job of so clearing this land at a stipulated price. Nourse prepared the land for burning, and set fire to the brush and logs upon this land, which escaped, as was alleged, through the carelessness and negligence of Nourse, to the plaintiff's land, and consumed his wood, timber, and fences:

Held, that the defendant would not be liable for the negligence or carelessness of Nourse by virtue of any relation between the defendant as committee of the town, and Nourse as a contractor or sub-contractor, who had the entire management and control of the clearing of the land, according to his contract: *Wright v. Holbrook*, 52 N. H., 120.

4. Whether the town of Keene, as owner of the land which Nourse was clearing could, under the circumstances, be held liable for the carelessness or negligence of Nourse, *quære*: *Bush v. Steinman*, 1 Bos. & Pul, 404, overruled; *Stone v. Cheshire, Railroad Co.*, 19 N. H., questioned. *Ib.*

QUESTION FOR THE JURY.

1. Whether the cellar along the line of a public street, unprotected by a suitable barrier, constitutes a defect, is a question for the jury in an action against a city to recover damages for an injury caused by such defect; and this, although the cellar is not in the general direction of travel, and although the plaintiff was not traveling along the street, but was crossing it, and intended to pass from the street into a lane (where he had a right to go), but mistook its locality in a dark night, and fell into the cellar: *Suck v. Portsmouth*, 52 N. H., 221.

2. The admission of the plaintiff's wife to testify to his physical condition after an injury, and to his statements, when alone with her, of suffering pain, involves no violation of marital confidence: *Ib.*

RECEIVER.

While property is in the hands of a receiver, no right to it can be acquired by sale under execution; and it makes no difference that the receiver appointed decline to act, the property was nevertheless in the custody of the law: *Skinner v. Maxwell*, 68 N. C., 400.

RES ADJUDICATA.

Where a factor is sued in another State for the price of goods consigned to him, which he had sold, and pleads that he had fully accounted with his consignor, and paid him, which suit is determined against him, and judgment rendered in favor of the consignor, the factor is estopped from afterwards suing the consignor for expenses incurred in preparing said goods for sale and for freight paid by him on the goods, and advances made upon them and commissions, where such former judgment is pleaded against him: *McCroskey v. Mabry*, 45 Ga., 327.

RESCISSION OF CONTRACT.

1. When a party seeks to rescind a contract entered into on fraudulent representations, he must return or offer to return the property acquired by such contract, within a reasonable time, and in such a way as to place the property and the vendor substantially in the same condition as at the time the property was received: *Manahan v. Noyes*, 52 N. H., 232.

2. In case of fraud by the vendor in the sale of real estate, whether a notice by the vendee in possession, of a refusal to retain and pay for the property, given to the vendor four days after the completion of the contract, was a reasonable time, within the rule relating to the rescission of contracts, is a question of fact and not of law: *Ib*.

3. Assumpsit for money had and received will lie where a contract is rescinded, to recover the money paid under it: *Ib*.

4. Where A. gave to B. a five hundred dollar bill in order that B. might change it and pay three hundred dollars of it to C., if the authority of B. to pay such sum to C. was countermanded by A. before payment:

Held, that all the money remained the property of A. who was entitled to recover it of B., in an action of assumpsit for money had and received: *Ib*.

RESULTING TRUST.

Parol evidence is admissible to rebut the presumption of a resulting trust. A. deposited a sum of money in a savings bank in the name of B., who was her niece, intending that it should be a gift to B., but retained the deposit-book in her own possession until her death. A by-law of the bank provided that deposits should only be withdrawn by the depositors or persons authorized by them. During her last sickness, A. for the first time informed B. of the gift. On a bill in chancery, brought by the administrator of A. against B. and the bank to recover the deposit, it was

Held, that the deposit created a trust in the bank in favor of B., and that, upon information of what had been done, being conveyed by A. to B., and acceptance by B., her title to the money became absolute, although there was no delivery of the deposit-book: *Blasdel, Adm'r., v. Locke et al.*, 52 N. H., 238.

RIPARIAN OWNERSHIP.

1. The soil of the *alveus* of a river in which there is no tidal effect belongs to the adjacent riparian proprietors, the ownership of each extending *usque ad medium filum aquæ*, where the opposite banks belong to different persons: *The Norway Piano Company v. Bradley*, 52 N. H., 86.

2. An encroachment on the *alveus* of a running stream may not be complained of without the necessity of proving that essential damage has been sustained or is likely to be sustained therefrom: *Ib*.

3. No priority of occupation or use of water by a mill-owner upon a stream affects the right of a riparian proprietor above, to a reasonable use of the water flowing over his own land, by making improvements thereon, even to the extent of erecting a

solid building upon the *aloeus* of a stream, thereby diminishing the width of the current, unless such encroachment sensibly and injuriously affects the rights of such mill owner: *Ib.*

SLAVE CONTRACTS.

1. In May, 1854, A. and B. sold and conveyed to C., with warranty of title, a plantation, fifty slaves and some chattels, and C., at the same time, gave to them his bond for the purchase money, amounting to \$49,000, payable in installments, with interest; and to secure the payment of the bond, gave to them two mortgages—one of the plantation and the other of the slaves. The slaves remained in the possession of C. and his administrator until 1865, when they were emancipated. On bill, filed in 1866, to foreclose the mortgage of the plantation:

Held, that the administrator of C. was entitled to no abatement because of the emancipation of the slaves, and decree of foreclosure for the full amount of the debt was entered for plaintiffs: *Culhoun v. Culhoun*, 2 S. C. (new series), 283.

2. It is no breach of a warranty title, contained in a bill of sale of slaves, that they were afterwards liberated by the government, nor, to an action on a bond for the purchase money of the slaves, can such liberation be set up as a defense on the ground of failure of consideration: *Ib.*

STARE DECISIS.

When a rule, by which the title to real property is to be determined, has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should, itself, be constant and invariable: *Smith v. McDonald*, 42 Cal., 487.

STATUTE OF FRAUDS.

1. Where A., a merchant, is indebted to B. and C., and sells his goods to B. for more than his indebtedness to him, and while B. is in the act of taking possession of the goods, and removing them out of the county, C. threatens to sue out an attachment against the goods for his debt, in consequence of which threat, B. promises that the surplus over and above his debt should go to the payment of the debt of C., whereupon, C., relying on such promise, desists from suing out the attachment, the promise is an original undertaking on the part of B., and not a promise to answer for the debt, default or miscarriage of another, and hence need not be in writing: *Davis v. Banks et al.*, 45 Ga., 138.

2. A parol license to one to enjoy a permanent easement upon the land of another, (as to back water upon it) is an interest in the land, and must be in writing, by the Statute of Frauds, and is void at law: *Cook v. Pridgen, Stapler & Dunn*, 45 Ga., 331.

3. But if the licensee, in pursuance of the license, goes forward, and for the enjoyment of the easement makes large investments, and the easement be one in its nature permanent, equity will decree a specific performance as in other cases of a part performance, by one party, of a parol contract for the sale of lands: *Ib.*

STREETS.

A city has the right to raise the grade of a street; and if the contractor performs the work with proper care and skill, he is not responsible for any damage which may result to the contiguous property: *Shaw v. Crocker*, 42 Cal., 435.

SURETY.

A surety who pays the bond of his principal thereby discharges it; and his right of action against the principal for the recovery of the amount of such bond being

upon a simple contract, is barred after three years by the statute of limitations: *Bledsoe v. Nixon et al.*, 68 N. C., 521.

TITLE.

1. Where land and the franchises of a town containing it were granted to the same persons by the same charter, this was held to vest no title to the land in the town as a municipal body: *South Hampton v. Fowler*, 52 N. H., 225.

2. A town acquires no title, by virtue of its act of incorporation, to land within its limits not before granted: *Ib.*

3. If the title to lands in Hampton not granted to individuals was in the town and a new town was formed within its limits containing the land, the title still remained in Hampton; affirming the doctrine of *Union Baptist Soc. v. Candia*, 2 N. H., 20: *Ib.*

4. Votes of a town in possession of land, showing a claim of title, are admissible, as giving a character to its possession; but where there is no evidence of possession, they are inadmissible: *Ib.*

5. Records of a town which holds land as a private corporation, unless accompanied by possession, are not admissible, even against a stranger, to prove that the town claimed the title: *Ib.*

TRUSTS AND TRUSTEES.

1. A trust to pay the income of the settled property to a married woman "for and during the joint lives of her and her husband, taking her receipt thereof," gives her a sole and separate estate in the income: *Charles v. Coker*, 2 S. C. (new series), 122.

2. To create such an estate, technical words are not necessary. If a plain intention to exclude the husband appears, that is enough, and a declaration making the receipt of the wife a sufficient discharge, shows such intent: *Ib.*

3. J. bargained for a tract of land, and received a bond for titles, which he afterwards transferred to C., as security for advances made and to be made. C. having paid for the land, and taken a conveyance to himself, held, that he could hold it only as security for any balance due him on the account for advances and money paid: *Ib.*

4. In February, 1861, C. purchased from J., the husband, but not the trustee of the *cestui que trust*, certain slaves of the trust estate:

Held, that C. could not, after the general emancipation in 1865, treat the transaction as void and inoperative, because J. had not title to the slaves, or right to sell them, but that he was liable to account for the benefit of the *cestui que trust* for the sum he had agreed to pay, with interest thereon: *Ib.*

5. Where a trustee, having no such authority by the terms of the trust, invests the trust funds in the purchase of land, and gives a mortgage thereof to the vendor for an unpaid balance of the purchase money, he is guilty of a breach of trust; and if the vendor has notice, he is so far responsible for the equitable delict that he can not enforce his mortgage without providing that the trust funds be replaced out of the proceeds of a sale of the mortgaged premises before any part thereof be applied to the mortgaged debt: *Mathews v. Heyward*, 2 S. C. (new series), 239.

6. Where a mortgagee is responsible for a breach of trust committed by the mortgagor, his assignee, with notice, is subject to the same equity in enforcing the mortgage to which he was subject: *Ib.*

VERDICT.

A juror's affidavit will not be received to impeach his own verdict: *Westmonland v. The State*, 45 Ga., 225.

WAIVER.

It is too late for an administrator, after he has been by *scire facias*, made a party to a suit against his intestate and another on a contract, to plead or object that the suit is such an one on its face, as must go on against the survivor alone: *McArdle v Bullock & Ratcliffe*, 45 Ga., 89.

WILL.

1. A direction in a will to *divide* an estate *real* and personal, is not a direction to *sell* the real estate for a division: *Hence*, the words, "The rest and residue of my estate, whether real or personal, I give to be divided between the legatees herein mentioned, in proportion," &c., confer no power on the administrator *cum testamento annexo* to sell such real estate for the purpose of a division: *McDowell v. White*, 68 N. C., 65.

2. The marriage of a testator or the birth of a child to him subsequent to the making of a will, in which no provision is made in contemplation of such an event, is, by presumption of law a revocation of the will, and this presumption can not be rebutted by any declarations of testator, whether by parol or in writing, at the time of the marriage, or even by a settlement on the wife, and a renunciation by her of all interest in the estate of the husband, unless the declaration or provisions be testamentary in their character, and be executed by the testator with the forms and solemnities required for making a will: *Deupree et al., v. Deupree et al.*, 45 Ga., 415.

Digest of United States Supreme Court Decisions.

[From 15th Wallace.]

APPEAL.

Does not lie to this Court from the Circuit Court for the discharge of a rule on the Marshal, to show cause why he should not make to one, asserting himself to be a purchaser on execution under a judgment at a Marshal's sale, a deed for real estate sold, and ordering the person asking the rule to pay the costs. The remedy is by writ of error: *Burrows v. The Marshal*, 682.

ASSIGNMENT OF ERRORS

Must be made in conformity with the rules of the Court, or the errors will not be noticed: *Deutsch v. Wiggins*, 539.

BANKRUPT ACT.

1. To avoid, under the 35th section of the Bankrupt Act, a sale made within six months of a bankruptcy, by a person insolvent, two things must concur: A fraudulent design on the part of the bankrupt, and the knowledge of it on the part of the vendee, or reasonable cause to believe it existed: *Tiffany v. Lucas*, 410.

2. A contract or engagement is not provable under the 5th section of the Bankrupt Act, of 1841, authorizing proof of "uncertain contingent demands" so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation. The position illustrated by a case relating to a wife's right of dower: *Riggin v. Maguire*, 549.

COLLECTORS AND RECEIVERS OF PUBLIC MONEY.

Though under bond to keep it safely and pay it when required, not bound to render the money at all events, excused if prevented, without any neglect or fault, by the act of God or the public enemy, from rendering it. The liability stated: *United States v. Thomas*, 337.

COMMON CARRIERS.

How far liable for injury occasioned by the contents of packages carried by them, which prove of a noxious or destructive character: *The Nitro Glycerine Case*, 524.

CONFISCATION ACT.

1. Of July 17, 1862, meaning therein of the words, "estate, property, money, stocks, and credit of rebels." If the proceedings, including the service of the writ be in proper form, a forfeiture of a debt due to a rebel may be rightly decreed, though the evidences of the debt have not been actually seized: *Brown v. Kennedy*, 591.

2. Where, under the forms of a forfeiture and sale of a rebel's estate, &c, as under this Act, nothing, owing to a defect in the proceeding, or in some of them, has really passed to the purchaser, and the rights of the rebel have been uninjured, no damages but nominal ones can be recovered by him of a Marshal for an alleged false return; *Pelham v. Way*, 196.

CONGREGATIONAL CHURCH.

The mere assemblage in a church body where the congregational government prevails, of a majority of a congregation forcibly and illegally excluded by a minority from a church edifice in which, as part of the congregation, they had been rightfully worshipping in another place, the majority thus excluded, maintaining still the old church organization, the same trustees, and the same deacons, is not a relinquishment of rights in the church abandoned, and the majority thus excluded, may assert, through the civil courts, their right to the church property. In a Congregational Church, the majority, if they adhere to the organization and to the doctrines, represent the church: *Bauldin v. Alexander*, 131.

CONSOLIDATION OF RAILROADS.

Where railroad companies are consolidated by act of Legislature, the presumption is, that each of the united lines of the road will be held with the privileges and burdens originally attaching thereto, unless the contrary is expressed: *Tomlinson v. Branch*, 460.

CONSTITUTIONAL LAW.

1. The constitutionality of the acts of Congress of February 25, 1862, and of subsequent acts in addition thereto, making certain notes of the United States a legal tender in payment of debts, re-affirmed: *Railroad Company v. Johnson*, 195.

2. A statute of a State imposing a tax upon freight taken up within the State, and carried out of it, or taken up without the State, and brought within it, is unconstitutional: *Case of the State Freight Tax*, 232.

3. A statute of a State imposing a tax upon the gross receipts of Railroad Companies is not unconstitutional, though the gross receipts are made up in part from freights received for transportation of merchandise from the State to another State, or into the State from another: *State Tax on Railway Gross Receipts*, 234.

4. A law of a State taxing bonds of a debtor within the State, held by a person outside of it, is unconstitutional, and the fact that the bonds are secured by a mortgage on land in the State, does not affect the case: *Case of the State Tax on Foreign-held Bonds*, 300.

5. A State law (whether a State Constitution or State statute) which withdraws from a lien of judgment, property which, when the judgment was obtained, the lien, under the then existing State statutes, bound, is unconstitutional: *Gunn v. Barry*, 610.

6. The 20th section of the Act of July, 20, 1868, (to the effect that in no case shall a distiller be assessed for a less amount of spirits than 80 per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent., he shall also be assessed upon the excess,) laying, as it does, a tax uniform in its operation, and establishing one rule for all distilleries, is constitutional: *United States v. Singer*, 112.

7. How far a provision in the Constitution or general statutes of a State, that charters subsequently granted by its Legislature, shall be subject to alteration, amendment, suspension, or repeal, changes the character of an act which might be invalid as impairing the obligations of a contract. This matter considered: *Tomlinson v. Jessup*, 454; *Miller v. State*, 478; *Holyoke Company v. Lyman*, 500.

8. A State Legislature, unrestricted by constitutional prohibition, has power to exempt specific property from taxation: *Tomlinson v. Branch*, 460.

CONSTRUCTION, RULES OF.

1. Evidence of custom or usage to explain them when written, and not technical or ambiguous, not favored: *Partridge v. The Insurance Company*, 573.

2. To ascertain the intent of the parties is the fundamental rule in the construction of the agreements. When the substantial thing which they have in view can be gathered from the whole instrument. It will control mere formal provisions, which are intended only as a means of attaining the substance: *Canal Company v. Hill*, 94.

3. The state of things and surrounding circumstances in which an agreement is made will be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining what is its true subject matter: *Id.*

CONTRACT.

1. A party binding himself to deliver personal property, can only be relieved in this respect on the ground of clear refusal of the other party to receive or becoming disabled to perform his part of the contract: *Smoot's Case*, 37.

2. A contract made by a city which had passed a resolution to destroy a certain sort of property, to pay to its owners the value of it, held obligatory, though the resolution and contract were made in view of certain capture of the city by a beleaguering army, and though, as it proved, the property would have been destroyed at all events, and by a wholly different cause, if the city had not destroyed it: *City of Richmond v. Smith*, 429.

CONTRIBUTORY NEGLIGENCE.

In a suit by one against a railroad company for injuries done him, contributory negligence is a defense to be proved by the company: *Railroad Company v. Gladman*, 401.

COUNSEL FEES.

1. The plaintiff's on a successful suit for damages against a treasury agent for illegally seizing and retaining property disallowed: *Flanders v. Tweed*, 450.

2. Disallowed, also, in a suit on an injunction bond: *Oelrichs v. Spain*, 211.

DEPOSITIONS.

De bene esse under act of September 2, 1789, formalities in the taking of depositions, required by the act, may be waived by the party for whose protection they are intended. What amounts to such waiver? *Shutte v. Thompson*, 157.

ECCLESIASTICAL AND CIVIL COURTS.

Although the latter sort of courts will not in the case of persons excommunicated by competent church authority, go behind that authority and inquire whether the persons have been regularly or irregularly excommunicated, the said courts may inquire whether the expulsion was the act of the church or of persons who were not the church and who, consequently, had no right to excommunicate any one: *Boulton v. Alexander*, 132.

EQUITY.

1. Will not restrain the collection of a tax solely on the ground of its illegality, or where the proceedings to collect it are void on their face. Some cause presenting a case of equity jurisdiction must be alleged: *Hannewinkle v. Georgetown*, 547.

2. Nor unless the vendee has suffered injury by the delay not capable of being compensated by damages, rescind a fully executed contract for sale of lands, with a

covenant of warranty, where a defect of title existing when the conveyance was made, is offered, before final hearing, to be cured by the tender of a perfect title: *Keniball v. West*, 377.

3. Jurisdiction in, will be sustained when time, expense, and multiplicity of suits will be saved, as also when the case contains an element of trust: *Oelrichs v. Spain*, 211.

4. An injunction bond given to one who held the legal title to a fund, will enable him at law to recover, to the full extent, damages touching the entire fund; and a court of equity will follow the law in its proper distribution: *Ib.*

5. A release, even when sealed, can not be set up in equity to defeat those who were not parties to it and who had separate interests: *Ib.*

6. Estate of a surety bound jointly but not severally with his principal, discharged in law on his death, the other obligor surviving; and in equity also in the absence of equitable circumstances making him liable: *Pickersgill v. Lathens*, 141.

7. A receipt of a woman, before taken out letters of administration, by which she surrendered for an inadequate consideration, rights of herself and of her children, in her husband's estate, on which she afterwards took out administration, held void, as hastily and inconsiderately made, and when influenced by a friend, himself ignorant of many facts in the case: *Cammack v. Lewis*, 643.

8. A life insurance policy (in \$3,000) which, if held to be intended for the benefit of a creditor (to the amount of \$70) who took it out, would, owing to the smallness of the debt, necessarily be considered a sheer wagering policy, held under special circumstances to have been taken by him in trust for the debtor; his own debt, however, to be first provided for: *Ib.*

ERROR.

Though it be error to sustain in part, and overrule in part, a demurrer which is single, yet a complainant by amending his bill, and a defendant by answering, afterwards both waive their right to allege error; as a defendant specially does in such a case in this court by not appealing: *Marshall v. Vicksburg*, 146.

EVIDENCE.

1. A book of record kept by a County School Commissioner, now dead, of his transactions in selling the school lands in the county, deposited in the county clerk's office, and preserved as a public monument among the county archives, *de facto* a public record, and proper evidence of the commissioner's official acts. It is also admissible as the entry of a deceased person, made in the course of his official duty, in a matter of public concern, to prove his official transactions: *Handrick v. Hughes*, 124.

2. If a township plat be lost or destroyed, it may be proved by a copy; and memoranda on such copy, not contained in the original, if accounted for and explained, will not exclude the copy as evidence of the contents of the original, even though such memoranda be a translation of corresponding memoranda in the original: *Ib.*

3. When evidence has been given tending to show the insanity of a grantor, and other evidence to show his sanity, a medical expert can not be asked his opinion respecting that person's sanity or insanity, forming his opinion from the facts and symptoms detailed in the evidence: *Dexter v. Hull*, 9.

4. Such a witness may be asked his opinion upon a case hypothetically stated, or upon a case where the facts are certain and found, but he will not be allowed to

determine from the evidence what the facts are, and to give his opinion upon them: *Ib.*

5. In questions of boundary, reputation in the neighborhood at the present day is not admissible, unless it be traditional or derived from ancient sources, or from those who had peculiar means of knowing what the reputation of the boundary was in an ancient day: *Shutte v. Thompson*, 151.

6. Under a statute enacting that parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney; in fact, neither oral statements or conversations and admissions of a decedent, tending to prove an acknowledgement of a debt as due within the period of prescription, nor indorsements by himself on the bond of payments made of interest up to a term which took it out of that period, are admissible in a suit against his estate to charge it: *Adger v. Alston*, 555.

7. Where a party knowing of the loss of a vessel has her insured by a written policy (lost or not lost), he can not by parol proof show that the contract for insurance was made before the loss, though executed and paid for afterwards: *Insurance Company v. Lyman*, 664.

8. Nor abandon the written instrument as of no value in ascertaining what the contract was, and rely on the verbal negotiations: *Ib.*

9. Parol evidence may be given to show that a bill of sale of a vessel in terms absolute was, in fact, but a mortgage: *Morgan's Assignees v. Shinn*, 105.

INTEREST.

1. Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is entitled to interest, in the event of recovery, from the time of the alleged exaction: *Erakine v. Van Arsdale*, 75.

2. Where interest as a general thing is due, and there is no statute in the place where the account is settled and the transaction takes place giving interest, in such a case it is allowed at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character as the one on which the suit arises, by way of damages for unreasonably withholding an over due account: *Young v. Godbe*, 562.

3. Interest on loans made previous to and maturing after the commencement of the war, ceased to run during the subsequent continuance of the war, although interest was stipulated in the contract: *Brown v. Hiatts*, 177.

INTERNAL REVENUE.

The advance in the value of personal property during a series of years does not constitute the "gains, or income," of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property: *Gray v. Darlington*, 63.

JUDICIAL COMITY.

1. Where "all judicial proceedings" against a tenant who has gone through the form of making a *cessio bonorum*, or general assignment, have been stayed by order of a Court having, in the first jurisdiction over the subject of such assignments or ces

sions, the landlord's lien on the tenant's goods given by the law of Louisiana, if he take within a fixed and limited time judicial proceedings to seize them, is not lost by his not taking such proceedings within the time in which he would have been bound to proceed if judicial proceedings had not been thus stayed. This, even though the cession or assignment be finally decided to have been made by a party who had no right to make one, and the whole proceedings be thus declared void: *Holdane v. Sumner*, 600.

2. Effect given by the Supreme Court of the United States to the exposition of State statutes by the Supreme Court of the State: *City of Richmond v. Smith*, 429.

JURISDICTION OF THE UNITED STATES.

1. Has jurisdiction (other things allowing) of an appeal by a mortgagor alone where a decree has been against him personally, and against others as trustees: *Railroad v. Johnson*, 8.

2. Under the 25th section, where the record shows that in a suit on a contract the defendants set up that the contract had been rendered of no force by provisions of the Constitution of the United States and of certain acts of Congress, and that the decision of the highest Court of the State was against the right, title, privilege, or exemption thus specially set up: *Railroads v. Richmond*, 3.

3. Or where on a bill to enforce a vendor's lien, the vendee set up that the deed which the complainant had given him was insufficiently stamped, and the Supreme Court of a State, disregarded the objection, enforced the lien: *Holl v. Jordan*, 393.

4. And this jurisdiction under the 25th section will be entertained where the Court can see a Federal question raised under it, though raised somewhat obscurely, and though they had "a very clear conviction" that the decision of the State Court was correct: *Pennywit v. Eaton*, 380.

LIFE INSURANCE.

A policy for \$3,000, taken by one who has no interest in the life of the party assured beyond a debt of \$70, is a sheer wagering policy: *Cummack v. Lewis*, 643.

LOUISIANA.

Though in Louisiana a party from whom real estate there has been recovered by suit have a right to demand that the person recovering pay him the value of the materials and price of workmanship of buildings on the premises, if such person choose to keep them, yet such a demand will not be enforced where, in a peculiar and complicated case, the party has already in the decree against him been allowed in another form what, in conscience, the buildings were worth: *New Orleans v. Gaines*, 624.

MANDAMUS.

When ancillary to a jurisdiction already acquired and when not. In the latter case will not lie from the National Courts to State officers: *Graham v. Norton*, 427.

MESNE PROFITS.

The possessor, in continuous bad faith, of real estate which the true owner at last recovers, is chargeable under the claim of such profits with what the premises are reasonably worth annually, and interest thereon to the time of the trial. Five per cent. in a Louisiana case proper: *New Orleans v. Gaines*, 624.

MINISTERIAL OFFICER.

Can not be made a trespasser in any case where it is his duty to act: *Haffin v. Mason*, 671.

MUNICIPAL BONDS.

In a suit against a municipal corporation by a *bona fide* holder of its bonds, whose title accrued before maturity, the corporation can not show by way of defense, if the legal authority of the corporation to issue the bonds is sufficiently comprehensive, a want of compliance on its part with formalities required by the statute authorizing the issue of the bonds, or show fraud in their own agents in issuing them: *Grand Chute v. Winegar*, 355.

NEGLIGENCE.

In suits against a railroad company, by a person outside the car for injuries received, where the defense involves the question of the party's own negligence, an infant is not held to the same law as is an adult. But by the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case: *Railroad Co. v. Gladman*, 401.

OFFICIAL BOND.

Cover not merely duties imposed by existing law, but duties belonging to and naturally connected with the office and business in which the bonds are given, imposed by subsequent law, provided, however, that the new duties have relation to such office or business: *United States v. Singer*, 112.

PATENT.

1. Where three elements are claimed in a patent, in combination, the use of two of the elements only does not infringe the patent: *Gould v. Res*, 187.

2. The introduction of a newly discovered element or ingredient, or one not theretofore known to be equivalent, would not constitute an infringement: *Ib*.

PRACTICE, IN CASES GENERALLY.

In the jurisprudence of the United States, the objection that there is an adequate remedy at law raises a jurisdictional question, and may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by counsel: *Oelrichs v. Spain*, 211.

PUBLIC LANDS.

One does not, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. The effect of the pre-emption laws stated: *The Yosemite Valley Case*, 77.

THE REBELLION.

The forcible seizure during the late rebellion, by the rebel authorities, of public money of the United States, in the hands of loyal government agents, against their will and without their fault or negligence, was a sufficient discharge from their obligations, under their bonds, to keep such money safely, and pay it over when required to the United States: *United States v. Thomas*, 337.

TAXES, ILLEGALLY PAID.

May always be recovered back, if the collector understands from the payer that the tax is regarded as illegal, and that suit will be instituted to recover it; and in the

event of the recovery, the taxpayer is entitled to interest from the time of the exaction: *Erskine v. Van Arsdale*, 75.

TRUSTEE, EX MALEFICIO.

1. A person lending money to a trustee on a pledge of trust stocks, and selling the stocks for payment of the loan, will be compelled to account for them, if he have either actual or constructive notice that the trustee was abusing his trust, and applying the money lent to his own purposes: *Duncan v. Jordan*, 165.

2. The lender will be held to have had this notice when the certificates of the stock pledged show on their face that the stock is held in trust, and when apparently the loan was for a private purpose of the trustee, and this fact would have been revealed by an inquiry: *Ib.*

3. The duty of inquiry is imposed on a lender lending on stocks, where the certificate of them reveals a trust: *Ib.*

4. These principles are not affected by the fact that the stocks pledged may be such as the trustee under the instrument creating his trust has no right to invest in, as *ex. gr.* stock of a canal company when he was bound to invest in State or Federal loans: *Ib.*

5. Notice to the Cashier of a bank, or bankers, that the stocks pledged is trust stock, is notice to them: *Ib.*

*Digest of Recent Unreported Decisions of the Supreme Court of
Tennessee, Delivered at Jackson, April Term, 1873.*

AFFIDAVIT.

An affidavit *in forma pauperis*, made by next friend and infant, but stating that the next friend, owing to poverty, &c., was not able, &c., held bad. *Brooks v. Workman*, 21.

ARBITRATION.

1. A next friend can not submit an infant's cause to arbitration: *Tucker v. Dabbs*, 113. BURTON, J. Sneed dissented; McFarland held the point not raised.
2. A judgment being rendered upon an award in favor of an infant made upon a submission by a next friend, the judgment was affirmed: *Ib.*

ATTACHMENT.

1. The proceeding by attachment against boats to enforce liens is not a proceeding *in rem*, nor an admiralty proceeding, and does not conflict with the exclusive jurisdiction of the Federal courts in admiralty: *Waggoner v. St. John*, 63.
2. An attachment to enforce a lien on a boat for supplies is not void because it does not state the particulars of the debt, if they are set out in the declaration and the general issue pleaded: *Ib.*
3. Property levied on by the Marshal of a Federal Court, for which a delivery bond has been taken, is not subject to attachment in the State Court: *James v. Kennedy*, 59.

BANKRUPTCY.

The pendency of a petition in Bankruptcy does not render a judgment against the petitioner void. It does not operate as an injunction *per se* against a suit pending in a State Court. Such bankruptcy is no defense to a motion for non-return of an execution on the judgment: *Porter v. Kendale*, 9.

BANKRUPTCY SALE.

A discharged bankrupt may sue and recover upon choses in action bought at the sale of his own assignee: *Carter v. Coleman*, 105.

BOND.

The bond for an appeal on overruling a demurrer is not required to be for the payment of the debt: *Crawfort v. Aina Life Insurance Co.*, 153.

CERTIORARI.

1. A statement in a petition for certiorari and *supersedeas*, that no one was authorized to enter petitioner's name as stayor, does not put in issue the *factum* of a written order: *Wade v. Pratt*, 149.
2. Plaintiff, a widow, sent her son for a mare, which had, by some unknown means, got into the hands of the defendant. The son brought her home and gave no information as to the steps by which he obtained her, except that he made some

sort of affidavit. It turned out that he had brought replevin. She, through ignorance of the fact, did not prosecute the suit, and a judgment was obtained against her:

Held, sufficient cause for not appealing to support a certiorari: *Fox v. Fields*, 118.

DISCHARGE IN BANKRUPTCY.

Bankruptcy discharge can not be attacked for fraud in a State Court: *Hudson v. Bigham*, 122.

ELECTION.

A contest of an election for justice of the peace must be instituted before a commission issues. After that the only remedy is by a proceeding in the nature of *quo warranto*: *Gallagher v. Moore*, 158.

EQUITY OF REDEMPTION.

The application to sell land in Chancery without redemption, must be by the prayer of the bill: *Carter v. Baker*, 67. S. P. 155, *Thurston v. Belvate*.

EVIDENCE.

Where the line of a grant is called for in a deed or grant, the locality of the line may be introduced without producing the grant: *Hughlett v. Connor*, 127.

EXAMINATION OF FEME COVERT.

"Freely" is equivalent to "voluntary" in the certificate of primary examination of a *feme covert*: *Hunt v. Harris*, 152.

EXCESSIVE LEVY.

A plaintiff is not liable for an excessive levy made by a sheriff, unless he has procured knowingly the excessive levy. He is not bound to know beforehand the exact amount of property that will make his debt, nor will the mere levy, without more, subject him to an action: *Beasley v. Johnson*, 5.

EXECUTOR.

1. Executor, holding a fund bequeathed to A. for life or widowhood, on marriage, one-half to go to B., and on death of A. the other half; procured A. to take three negroes which he held on trust to sell, in lieu of the money. The negroes were delivered and lost by the war. The executor, as next friend of B., filed a bill on A.'s marriage, to have an account of half the fund:

Held, that he should not have been allowed to prosecute the suit as next friend, and that he was liable for the fund: *McHaney v. McNeilly*, 78.

2. A bill by one executor against his co-executor, alleging the receipt of considerable sums by the co-executor, and that he had put the same in his own pocket. That he had sent out of the State large quantities of tobacco and cotton, and was buying and contracting for large quantities of cotton and tobacco at wild and reckless prices, and has shipped part and is preparing to ship the remainder to points beyond the State, that he has been drinking very hard for six months, continually intoxicated, and incapable of doing business, and alleging fear of loss, on which he has obtained an attachment which was subsisting at the death of the co-executor:

Held, to give a lien superior to creditors under an insolvent proceeding: *Boyd v. Roberts*, 50.

FRAUD.

Gross inadequacy of price is evidence of fraud against creditors: *Hartsfield v. Simmons*, 156.

FRAUDULENT CONVEYANCE.

A. made a fraudulent conveyance to B. for A.'s use. C. buys the land of A. and by his order a deed is made to C., in which a mistake occurs:

Held, that a bill lies to rectify the mistake, though the bill charged the fraud on creditors intended in the deed to B., and notice by C. of the fact: *Parrot v. Scott*, 16.

GARNISHMENT.

A garnishment on an original attachment signed by a J. P. instead of the officer, is good after answer without exception taken, if not before: *Alter v. Moody*, 143.

GUARANTY.

A guaranty in these words: "For value received, I assign the within judgment, and guaranty the payment for the same;" held an absolute guaranty,

Held, further, that mere inaction or refusal to give an indemnity bond to an officer who had levied on property of the judgment debtor, would not release the assignor: *Brasfield vs. Irome*, 22.

GUARDIAN AND WARD.

A guardian is not under the act of 1869-70 chap. 70, a competent witness to charge himself of debt due his ward: *Comwood v. Cooper*, 132.

HUSBAND AND WIFE.

The wife's right to a leasehold property in land is not subject to sale to pay the husband's debts. Code, 2481: *Kelley v. Shultz*, 159.

INSOLVENT.

It is no ground for a bill to enjoin a judgment against a Constable for the non-return of an execution that the defendant in the execution was insolvent: *Porter vs. Kendall*, 9.

INTEREST.

An act authorizing a certain corporation to issue bonds with interest at the rate of 10 per cent., is contrary to the Constitution, providing for uniformity of the rate of interest: *McKinney v. Overton Hotel Co.*, 133.

IRREGULARITY.

It seems that irregularity in publication in a Chancery case as to one defendant is only a ground to remand the cause to the rules: *Guthrie v. Brown*, 6.

JUDGMENT.

1. A contract to pay ten per cent. interest, under the act of 1860, for conventional interest, when reduced to judgment, bears interest at the rate of six per cent., only: *Wade v. Pratt*. Sneed dissenting on this point.

2. A judgment recovered against the administrator of an insolvent estate must be filed within the two years and six months limited for suits against the estate, or the claim will be barred: *Martin vs. Blakemore*, 79, 1879. S. C., on re-hearing, 1873.

JUDGMENT ON GARNISHMENT.

Execution from the Supreme Court levied on 40 shares of corporate stock. Fifteen shares were sold, and the sale of twenty-five shares enjoined. The company was summoned as a garnishee, and answered that there was at the time of service, on the books, in the name of defendants, \$2,500 stock, \$400 stock dividend, \$200 cash divi-

dend, and that since the service, there was a stock dividend of \$1,450 on the \$2,500 of stock. Before the service, defendant had transferred \$1,500 of stock, on which there was a subsequent stock dividend of \$750. Judgment against the company for the \$200 cash dividend and to sell the \$400 stock dividend, these not being effected by the injunction as to the stock, nor the sale under the execution: *Montedon Co v. Page*, 18.

LEVY.

In a conflict between levies by a Marshal of the United States, on an execution from a Federal Court, and a Sheriff under State process, the lien of the process is not considered, but the priority of levy is controlling: *James v. Kennedy*, 60, on rehearing.

LIABILITY OF CARRIER.

A package misdirected by the owner, was receipted for, as to be sent to the intended point. Being sent according to the erroneous direction, it was lost by fire:

Held, that the carrier was not liable for the loss: *Southern Express Company v. Kaufman*, 145.

LIABILITY OF MUNICIPAL CORPORATION.

A boat being sunk by collision with a cylinder projecting from a wharf which belonged to the city of Memphis, controlled by a wharf-master, and on which it was entitled to wharfage:

Held, that the city was liable for the loss resulting: *City of Memphis v. Kembrough*, 135.

MARRIED WOMAN.

Real estate bought in the name of a married woman for her separate use, paid for with money borrowed for the purpose, for which her note and her husband's was taken, can not be subjected to repay the money borrowed, though the husband was insolvent: *Davis v. Durant*, No. 13. Decided 1872. Re-heard and affirmed, 1872, No. 14.

MORTGAGE.

1. A mortgagee is not liable to make good any deficiency in the title of lands sold under his mortgage. The purchaser must look to his covenants: *McMurray v. Brasfield*, 48.

2. If the sale is made in Chancery the rule is the same after confirmation and title vested, and purchase money paid to the mortgagee: *Ib.*

NEWSPAPER NOTICE.

A newspaper sent by mail with a notice of dissolution marked, not equivalent to a letter or circular, and not sufficient evidence of notice: *Haynes v. Carter*, 109.

NON-JOINDER OF WIFE.

A bill filed by the heirs of a wife to set aside a sale of lands by husband without joinder of the wife, need not be accompanied by a tender of or offer to return the purchase money: *Wyley v. Heidell*, 131.

NOTICE.

notice that certain matters will be contested in a Chancery suit, does not put such matters in issue: *Hudson v. Bigham*, 122.

NOTICE OF ENTRY.

Defendant asked the Court to charge that if the defendant were in possession of the land when the plaintiff's grant issued, the plaintiff must show that he gave thirty days' notice of his intention to enter the land :

Held, no error to refuse this instruction, the statute relating to the time of entry, not of the grant: *Latham v. Eaves*, 49.

NUNC PRO TUNC.

A plaintiff in an attachment suit entered judgment against the principal defendant, but omitted to take judgment against the surety in the replevin bond :

Held, that the judgment could not be entered *nunc pro tunc*, at a subsequent term: *Rafalsky v. Kraus*, 95.

PARTNERSHIP.

1. If a note, as drawn by one partner in a printing office, and indorsed by him in the partnership name in the absence of proof, authority will not be implied and an innocent holder of such note can not recover on it, if the note is, in fact, executed for an individual debt, and indorsed without authority: *Pooley v. Whitmore*, 64.

2. A partnership debt being filed against the estate of the surviving partner, in the hands of the administrator :

Held, to be good, as a claim against the partnership estate: *Brooks v. Brooks*, 110.

PART PAYMENT OF NOTE.

A payment of part of a note within six years, does prevent the operation of the Statute of Limitations as to the remainder: *Locke v. Wilson*, 19.

PAYMENT.

Agreement by third person to pay a constable a debt, and credit given on the execution, payment being actually made afterwards,

Held, that the debt was satisfied, and plaintiff could not proceed against the defendant on the execution: *Cain v. Bryant*, 121.

POWER OF LEGISLATURE.

The Legislature has the right by general law to prescribe the mode of proceeding to assess damages for bonds taken for railroads, and such mode will prevail over the mode prescribed by the charter: *Mississippi R. R. Co. v. McDonald*, 125.

PRACTICE.

In cases against railroads for damages the proper practice is for the plaintiff to prove his case, and if the company prove statutory precautions, plaintiff may contradict in reply: *L. & N. R. R. Co. v. Parker*, 117.

PREFERENCE.

1. Deed of trust providing for preferences of sundry persons named, "and all other debts we owe for borrowed money," held void: *Young v. Gillespie*, 151.

2. The interest of an insolvent heir in land is not subject to pay a debt due from him to the estate in preference to a debt to an attaching creditor: *Mann v. Mann*, 154.

REPLEVIN BOND.

On a replevin bond, given for the forthcoming of the property, no recovery can be had if the property perishes by the act of God: *Guthrie v. Brown*, 6.

SALE OF LANDS.

A sale of lands under an attachment before a J. P. void, because the judgment

was premature, without publication or appearance, and on an insufficient affidavit, will be set aside in equity. That a *certiorari* and *supersedeas* had been obtained in the case, and dismissed on motion, the record not stating the grounds of the motion, will not preclude this relief: *Stuart v. Mitchell*, 57.

SECURITY.

The security for an appeal from a J. P. in a case of unliquidated account is liable only for costs and damages, not for the debt: *Mason v. Anderson*, 114: *DEADERICK, J.*, on rehearing.

Held, that as the Court below rendered judgment against the surety for the debt, and the case did not show whether it was signed by the party, the presumption was in favor of the judgment below, and so the judgment was affirmed: 137.

STATUTES OF LIMITATION.

The suspension of the Statutes of Limitation was effectual as to all claims not barred before its passage: *Moore v. Brannock*, 54.

SURETY.

1. A note being presented to C. with the names of A. and B., he signed his name with the word "surety." B. having proved that he was surety for A. claimed contribution from C. as co-surety:

Held, that the facts raised a presumption that C. was surety of A. and B.: *Coleman v. Norman*, 66.

2. Taking judgment against a surety on an injunction bond, and collecting part, does not prejudice the plaintiff's right to proceed *de novo* against a surety defendant in the original judgment, who did not join in the injunction, but afterwards attacked the original judgment and had it set aside for irregularity: *Gowan v. Graves*, 73.

TENDER.

A party entitled to redeem lands tendered the amount bid at the sale, &c., less the amount of rent. The purchaser disputed the reasonableness of the rent, and refused to accept the money. Tender held insufficient and purchaser's title absolute: *Bumpass v. Alexander*, 101.

TRESPASSER.

The military authorities of the United States having, during the war, laid down a railway on Vance Street, in Memphis, allowed the Mississippi & Tennessee R. R. Co., in 1865, to use the same. In using it they run over the defendant in error:

Held, that the company was a trespasser on the street: *Miss. & Tenn. R. R. Co. v. Nelson*, 58.

USURY.

A plea of usury that plaintiffs received (on the note sued on) a greater rate of interest than they were allowed by law to receive, is bad. It does not answer the whole declaration as required by the law of pleading, and it does not disclose the amount of usury as required by the Code: *Randle & Heath v. Merchants' Nat. Bank*, 62.

VENDOR'S LIEN.

The implied lien of the vendor of land applies to the sale of a leasehold: *Choate v. Tighe*. *Chrisman v. Booth*, on rehearing.

WAIVER.

A plaintiff having put in to several pleas a replication equivalent to a demurrer, the defendant without disposing of the replication, went to trial. Upon the issue joined, there being one issue of fact properly made :

Held, a waiver of all the defenses, but that upon the latter issue.

Note—There was no proof in support of those pleas held to be waived: *Cherry v. South*, 7.

WRIT OF PROHIBITION.

The Supreme Court can not, before final judgment and appeal, or writ of error order a writ of prohibition to issue to a Circuit Judge: *City of Memphis v. Haley*.

RECENT AMERICAN DECISIONS.

IN THE CHANCERY COURT AT NASHVILLE.

E. R. PENNEBAKER, Comptroller, vs. W. T. TOMLINSON and others.

To a bill filed by the Comptroller of the State against an Insurance Company and its creditors alleging that he held bonds deposited with him, under act of 1868, ch. 79, as security for risks taken by citizens of this State, that several of the creditor's defendants had attached the bonds by suits in other courts, setting out the facts, and asking that the fund be applied to the use of the parties entitled, and their claims ascertained, it is not a good ground of demurrer by one of these creditors, that he had, by his previous attachment suit in another court, acquired a prior lien on the bonds, and given that court jurisdiction over them which could not be interfered with by this court.

On the 6th of February, 1871, the complainant, in his official character, as Comptroller of the State of Tennessee, filed this bill, alleging that according to the requirements of the act of March 13, 1868, ch. 79, §3, the Home Insurance Company, of New Haven, Connecticut, deposited in his office twenty bonds of the State of Tennessee, of one thousand dollars each, bearing six per cent. interest, "as security for risks taken by citizens of this State." That about the 30th of December, 1870, the said Insurance Company failed and became insolvent, that on the 31st of Dec., 1870, Sugg, Fort and others filed their bill in this court, alleging a loss of property insured in said Company, and prayed and obtained an attachment of the bonds in the hands of complainant.

That on the same day W. T. Tomlinson and others filed their bill in the first Chancery Court at Memphis, against said Company and complainant, alleging that complainants had taken risks in said Company, and had been compelled to re-insure, and were entitled to return of premiums, and prayed and obtained an attachment of the bonds in complainant's hands.

That on the 2nd of January, 1871, Hollins, Burton, and others filed their bills in this court against said company and complainant, and attached said bonds.

That on the same day, Baxter, Champion & Ricks filed their bill in the Chancery Court at Knoxville against said company for \$800 fees due them, and attached said bonds in complainant's hands.

That on the 4th of January, 1871, W. T. White filed his attachment bill in this court.

That on the 5th of January, 1871, Sam'l Mulloy and others filed their bill in this court.

That on the 6th of January, 1871, H. W. Tilford filed his bill in this court.

That B. H. Keese has filed his attachment bill at Clarksville.

That on the 20th of January, 1871, Alfred Caldwell and many others filed their bill at Knoxville.

That on the 30th of January, 1871, Alex. Kennedy, Jr., filed his supplemental bill at Knoxville, in which he alleges an attachment of said bonds on the 15th of October, 1868, in the hands of G. W. Blackburn, the predecessor in office of complainant.

That Thos. Boyers has instituted an attachment suit before a Justice of the Peace for a small amount, and attached said bonds.

That there are other claimants against said fund. That it would be impracticable and unsafe to settle the claims of all these parties in scattered and separate suits. That he is advised that it is his duty as trustee of said fund to see that it is applied to the use of the parties entitled according to law, and to this end to come into this court, and compel the parties to interplead, and have their claims ascertained, and their rights adjudicated in this court, &c.

The propriety of this bill, under the circumstances, is so obvious that the defendants have all acquiesced except the defendant Alexander Kennedy, Jr. He has filed a demurrer assigning several causes, which in effect, however, only amount to this, that he had by bill, in the Chancery Court at Knoxville, against the Home Insurance Company, and G. W. Blackburn, the then Comptroller of the State, attached these bonds, and had thereby acquired a prior lien, and given the court at Knoxville jurisdiction over the funds which could not be interfered with by this court.

It is perhaps a sufficient answer to this demurrer to say, that the fact relied on does not sufficiently appear on the face of the bill to sustain the position of law, if well taken. The bill simply alleges that the defendant Kennedy had, on the 30th of January, 1871, filed his supplemental bill at Knoxville, in which he states that he had attached said bonds, on the 15th of October, 1868, in the hands of G. W. Blackburn, the predecessor in office of complainant. It is only an inference, not absolutely warranted in law, from the allegation that the fact is that the attachment was made as alleged.

But I do not choose to put the decision upon this technical ground, and shall consider, first, whether such an attachment, if made as claimed, would have any validity; and, secondly, whether, if valid, it would oust this court of the jurisdiction sought to be given to it by the complainant's bill.

The bill itself shows, and the fact is conceded by the defendant's counsel, that the bonds deposited by the Home Insurance Company, according to law, with the Comptroller, have never been taken from his custody, but are now in the possession of the complainant Pennebaker, subject to the orders of this court. What the defendant Kennedy means, therefore, by saying that he attached those bonds, is that he prayed and obtained an attachment, and that the sheriff made a return thereon that he had attached the said bonds by making known the contents of the writ to the then Comptroller. Is this an attachment of the bonds within the meaning of our attachment laws?

If we look outside of the decisions of our own State to the settled law as to what constitutes an attachment of personalty, the answer must be in the negative. Nothing is better settled by the decisions of our sister States than that the officer, in attaching personalty, must actually reduce it into possession, so far as, under the circumstances, can be done. What is an actual possession, sufficient to constitute an attachment, must depend upon the nature, bulk, and position of the property. It should be such a custody as to enable the officer to retain, and assert his power and control over the property, and so that it can not probably be withdrawn, or taken by another without his knowing it. And if having possession, the officer abandon it the attachment is lost: *Drake on Att.*, § 249 *et seq.*, and numerous cases cited. There is, upon this point, no conflict whatever in the authorities.

The necessity of a seizure of property to give jurisdiction in attachment cases was laid down by the courts at an early day in this State; but the fact that attachment by garnishment was co-extensive with the direct attachment has had a tendency to break down the lines between the two, and throws into the back ground the necessity of positive seizure under the direct attachment. It was held in two cases in Peck's Reports: "That in order to fix the cause in court in attachment cases, something should be seized, on which the court could proceed, either by being taken by the sheriff, or so disclosed by the garnishee, that an order could be made upon him, or upon such estate as, by his disclosure, the law would make liable to answer the demand. And that to take judgment prior to the seizure by the sheriff, on ascertainment of funds in the hands of the garnishee, would render the whole proceedings as much void as to take judgment before service of the original writ:" *Nashville Bank v. Ragsdale*, Peck, 296; *Cheatham v. Trotter*, Peck, 198.

The statute law takes for granted that personal property attached remains in the custody of the officer, but it provides for the sale of such property, if not replevied: Code, 3503, 3504, 3505. And for the collection by the officer of choses in action attached: Code, 3502. And the courts have held that the lien of the attachment is enforced by *venditioni exponas*, and may be lost by abandonment: *Snell v. Allen*, 1 Sw., 208.

The only decisions which throw any doubt over these conclusions are those in which it has been held that an interest in remainder in personalty may be levied on by attachment: *Lockwood v. Nye*, 2 Sw., 515; *Bank of Tennessee v. Nelson*, 3 Head., 634; *Sneed v. Bradley*, 4 Sneed, 301. But these cases may be reconciled with the other decisions either by considering that the seizure is still actual though temporary, as in the case of seizure of partnership on joint property by attachment or execution for the debt of one of the partners or joint owners; or that the attachment by notice is all that the nature of the subject admits of. It is to be noted, moreover, that all of the cases cited were cases where the creditor had exhausted his remedy at law by the recovery of judgment, and return of *nulla bona*, and therefore, no attachment was in fact necessary; and, in the case in 4 Sneed, the Court give expression to a doubt of the party's right to the attachment by using this language: "Supposing a proper case to have been made for an attachment." Besides, the attachment in *Lockwood v. Nye*, the leading case, was authorized by 1801, 6, 2, and by what the Court in *Graham v. Merrill*, 5 Cold., 622, 631, call "the power of the Court to grant attachments and injunctions in regard to property in the ordinary course of proceeding, when necessary or useful to obtain or secure its jurisdiction." There is nothing in these decisions to change the general rule that an actual seizure of property is essential to give validity to a direct attachment of personal property which is capable of being seized. If it can not be seized the creditor will be compelled to resort to a different mode of redress.

A still more fatal objection to the validity of the attachment relied on by the defendant Kennedy, is that the bonds in controversy could not, under the circumstances, be attached by a creditor of the Home Insurance Company. They were held by the Comptroller in his official capacity in trust "as security for risks taken by citizens of this State." Property so held is not attachable, both on account of the tenure of the holding, and of the official character of the holder.

It is well settled that property held in trust, mortgage or pledge, or upon equitable assignment, cannot be attached, either by direct attachment, or by attachment by garnishment. *Drake on Att.*, § 506, *et seq.*; *Wakefield v. Martin*, 3 Mass., 558; *U. S. v. Vaughan*, 3 Binney, 394; *Curtis v. Norris*, 8 Pick., 280; *Picquet v. Swan*, 4 Mason, 443; *Andrews v. Ludlow*, 5 Pick., 28.

Upon this ground, it has been held by our Supreme Court that money tendered in redemption of land and refused, is not attachable after bill filed to enforce redemption, whether the money remain in the hands of a third person, *Kildrew v. Elliott*, 8 Hum., 515, or is paid into court, *Williams v. Pemberton*, 5 Cold., 64. Nor is property of a debtor held by a creditor, for his own indemnity, *Fain v. Jones*, 3 Head., 308, nor personalty conveyed in trust, and sold subject to the trust by the debtor before attachment: *Williams v. Whopley*, 1 Head., 401.

The reason for the rule is obvious. The creditor can have no higher rights than his debtor: *Wood v. Thomas*, 2 Head., 161; and *Fleming v. Martin*, 2 Head., 43; and as the debtor himself could not take such property neither can the creditor.

It is even better settled that a public officer, who has money or funds in his hands to satisfy a demand which a person has upon him as a public officer, can not be adjudged a garnishee; or, as it has been put more broadly by the Supreme Court of Massachusetts, that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee (and, a portion, by direct attachment,) in respect of any money or property held by him in virtue of that authority. Thus, sheriffs, clerks of court, trustees of insolvents, and assignees in bankruptcy, disbursing officers, &c., are exempt from attachment or garnishment: *Drake on Att.*, § 477, *et seq.*

It was held at an early day in this State, that money levied by a sheriff by virtue of an execution can not be attached in his hands by garnishment: *Parley v. Gaines*, 1 Tenn., 208. And since then that the clerk of a court is not subject to garnishment for moneys received by him: *Drane v. McGavock*, 7 Hum., 132.

The language of Judge Green, in delivering the opinions in this last case, is so pertinent that I can not forbear quoting it: "If," says he, "the clerk of a court could be called on by garnishment to pay out money officially received, such a law would be most inconvenient and mischievous in practice. Take for example the clerk of the District Federal Court as in this case. A bankrupt has often numerous creditors, and when the dividend of his effects has been declared, the clerk might be served with garnishment from remote countries, where he must attend in person to answer, to the neglect of his official duties, and the detriment of the public service, to say nothing of the personal inconveniences and annoyance of himself."

The Comptroller of the State of Tennessee is a public officer of high importance. No money can be paid out of the State Treasury except upon his warrant. The law requires him to keep his office at Nashville, and the daily routine of duties demand his almost constant personal attention. He is clothed, in his official capacity, with a trust in the bonds required by law to be deposited in his office, by all the numerous Insurance Companies doing business in this State. Is it to be supposed for a moment, that every creditor of these different Insurance Companies may demand his time and his presence in any and every quarter of the State, to answer attachment proceedings or garnishment notices seeking to reach the bonds thus deposited? The idea is simply preposterous. In the case before us, we have suits at Knoxville, Memphis, Clarksville and Nashville, and one suit before a Justice of the Peace. The latter is not a whit more unreasonable than the suits in Court. No one of them has any validity, and the so-called attachments are void; first, because the Home Insurance Company has no attachable interest in them; and, second, because the official character of the Comptroller exempts him from such process.

But were it otherwise, it is clear that the only effect of the attachments would be to enable the creditors of the Home Insurance Company to reduce their claims to judgment, and to acquire a lien on the fund, but no priority. The law, under which the bonds are deposited, is equivalent to a statutory mortgage for the benefit of all

the citizens of the State having risks. In such cases, the rule is universal in this State that the creditors share the funds pro rata, and neither can acquire any prior rights over the other. Thus, the holders of notes given for land for security of which a lien is retained, the creditors of insolvent estates and creditors of insolvent corporations, share the funds ratably, for they are in each case impressed by law with the character of a trust, and in such cases equality is equity, unless otherwise directed by positive law: *Marr v. Bank of West Tennessee*, 4 Cold., 471; *Ewing v. Arthur*, 1 Hum., 537; *Graham v. McCampbell*, Meigs, 52; *Barcroft v. Snodgrass*, 1 Cold., 430, 441.

The Comptroller for the time being would have the right to come into this Court for the better administration of the trust fund, and to compel the creditors of the insolvent corporation, either by name, or general description, to come in and make themselves parties, and have their rights determined. Any decree or judgment undertaking to give any one of such creditors a superior lien or right would be void as against other creditors not parties to such suit, and as against the Comptroller made or attempted to be made, a party by attachment of the bonds.

The result is, that the demurrer of Kennedy must be overruled, with leave to file an answer.

W. F. COOPER, Chancellor.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA, FALL TERM
1873, AT DANVILLE.

In the matter of W. W. Kean, Bankrupt,
and
Jere. White, Bankrupt, and Eleven other Cases. } *Claims of*
Homestead.

These cases have been presented and heard together by way of raising for decision a variety of questions upon claims of Homestead. These questions arise under the late amendatory act of 3rd March, 1873, and so far as they are undecided by me, relate to the application of the relief thereby granted in cases pending at the passage of the act. The question of the unconstitutionality of this act, was decided by me at my Spring term in Lynchburg upon very full and able argument; but I have been willing to re-open the subject and review my opinions at the instance of this Bar, for whose ability I have so much respect, and from whose researches I am accustomed to derive so much assistance.

To dispose of these numerous cases under the different phases they wear, we must seek to settle some general principles to serve as clews to lead us through this labyrinth. This labor we might be saved at the threshold of the enquiry, if, indeed, it be true, as contended for by the counsel opposing these claims, that this relief is unconstitutional because it divests rights of property without just compensation and without due process of law, contrary to the fifth amendment of the United States Constitution. I do not contest that there is a vested right in judgment liens, which cannot be invaded under this provision of the Constitution, unless an express authority can be found for it in another part of that instrument, all parts of which must be construed and stand together. But this express authority is given

in the power of Congress to pass an uniform Bankrupt Law. The scope of this power came directly under review of the Supreme Court in the *Legal Tender* cases—(12 Wall., 457). The dissenting justices in that case, while invoking in their behalf the fifth amendment of the Constitution, and denying to Congress the right to impair contracts, yet conceded to Congress power to avoid the one, and accomplish the other, in the passage of a bankrupt act. Chief Justice Chase says: "It is true that the Constitution grants authority to pass a bankrupt law; but our inference is, that in this way only, can Congress discharge the obligation of contracts. It may provide for ascertaining the inability of debtors to perform their contracts, and upon the surrender of all their property may provide for their discharge."

Justice Fields, who also dissented, said, pointedly: "The only express authority for any legislation effecting the obligation of contracts, is found in the power to establish an uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property." Without therefore, resorting to the doctrines of the majority of the Court, I consider it as a concession in these cases, the power of Congress, in enacting a system of bankruptcy, to infringe vested rights and impair the obligation of contracts. But it is argued that the late case of *Gunn vs. Barry*, (15 Wall., 610), is an authority against this view. It is, however, upon a different question, namely, the power of a State, by constitutional provision, to divest the lien of a judgment, and is, I am glad to find, a conclusive authority in support of the decision of our Court of Appeals upon the eleventh article of our State Constitution. But it does not touch in the remotest degree, the power of Congress to disturb vested rights or impair the obligation of contracts so far as the same may result from the due exercise of its express power to establish an uniform system of bankruptcy. I can only express my surprise that the bar or the press should quote this decision as at all pertinent to the consideration of the provisions of a Bankrupt Law enacted by Congress in pursuance of an express power. It is of the essence of a Bankrupt Law to give exemptions, and grant a discharge. Neither can be done without invading vested rights, and destroying the obligation of contracts; both have the same effect and one not more than the other; the objection applies with equal force to the exemption and the discharge; and if waived, as waived it must be, to the discharge, it can not be urged, as it has been in argument here, as having greater force against the effect of the exemption.

The objection to the Act of 3d March, 1873, for want of uniformity, is far more plausible and difficult. As the law stood before this enactment, it gave the State exemptions in force in the year 1871. Objection was made to that on account of the diversity of these State exemption laws; but that objection may be considered as overruled by the Circuit Court of Missouri in the case of *Becherkord* (4 B: R. 59), in which case Justice Miller and the District Judge united in pronouncing the opinion of the Court against the validity of this objection. This decision has been generally acquiesced in, and I have never heard any authority quoted against it.

But while the propriety of recognizing State exemptions, however variant in the different States, as proper to be allowed by Congress in its bankrupt system upon the same principle that these exemptions are respected and served in the final process of execution from the United States Courts, it is urged that this act of 3 March, 1873, goes beyond the State exemptions *eo nomine*, removes restrictions therefrom, and in this way purports to amend State Constitutions and laws. We have seen that the power to exempt and discharge is plenary, and has no limitation but in the discretion of Congress. It can not alter the State exemption for State purposes; this would be, indeed, as urged, to alter State laws; but I do not see why Congress may not, in its discretion to effect certain objects in its bankrupt system, relieve these State exemp-

tions of restrictions deemed hostile to the spirit, principle and aims of that system. If it does so, it is a separate exercise of Congressional power, adding uniformly in all the States to the exemptions made by them; and is an act defensible upon this theory of the unlimited power of Congress in the enactment of a Bankrupt Law over exemptions whether given directly as an act of Congress or indirectly as a recognized and adopted act of the State. This act, therefore, in unfettering the State exemptions of certain restrictions, and enlarging their operation, is in its nature *mixed*; and partakes of a State exemption in one aspect, and in the other, of a Congressional enlargement thereof. If, in the first aspect, it has been judicially sustained, as we have already seen, as meeting the requirements of the Constitution in point of uniformity, I do not see, how, in the other aspect, it can be assailed as lacking this essential attribute of uniformity. The Congressional enlargement applies equally to all the States, and gives an uniform rule whereby to administer these State exemptions, not in State Courts, but in Courts of Bankruptcy, created by Congress to carry out their system of bankruptcy. I do not esteem it necessary to elaborate this view. I content myself with this brief statement of the reasoning which conducted me to the conclusion that the Act of last March was not obnoxious to this constitutional objection, however plausible and difficult of solution it seemed at first. But if the case had been stronger against the Law, it would scarcely become me in my inferior position in the Federal judiciary, to show such want of proper deference for a high co-ordinate department as to pronounce their act a violation of the Constitution. This I might be constrained to do if my convictions of its unconstitutionality were clear and settled; and in such a case I should not shrink from the duty to do so. But I am inclined to believe that those who may not yield to my reasoning, will at least agree that it is a case of *doubt*, which should always be resolved in favor of the Legislature. I must therefore, accept this Act as binding on this Court; and to be construed and administered so as to effectuate and advance the relief it was designed to give.

To construe and apply it, it is well to consider the origin of this measure. It is a history not devoid of certain matters of notable and curious interest, that will repay us for a cursory detail of the circumstances out of which it arose. These circumstances are familiar to the Bar of this State, but probably unknown elsewhere. The limitation in the original act to "State exemption laws in force in the year 1864," cut off the Homestead provision of our Constitution, whether taken to be operative from its adoption at the polls in July, 1869, or its acknowledgement by Congress in the re-admission of the State to representation in its halls in January, 1870. Whether this effect was produced in other States I am not prepared to say; but it was Virginia that first moved through its representatives, and led to the act of June 8, 1872, substituting the year 1871, for the year 1864. This, therefore, embraced the homestead of Virginia. But the question arose, judicially, what was that Homestead. It fell to the lot of this Court, at this place a year ago, to give the first decision under this amendment of June 8, 1872. It will be recollected that the Court was constrained to take the Homestead as expounded by the Court of Appeals of this State, and to hold it invalid and void as to debts antecedent to the time when the Constitution took effect. The point was immediately carried up for supervision to the Circuit Judge, who did not decide it; and recently it has been abandoned with the consent of Judge Bond, and the cases in which it arose, are now to be considered here as affected by the act of last March.

In this state of facts, recourse was had for relief against this decision to Congress for a new law. The power of Congress to relieve the Homestead of this restriction; and the Bankrupt Law of this distinction, in debts because of their dates, so destruc-

tive of the equality it establishes between all demands on the general assets of the Bankrupt, was acknowledged in the opinion of the Court in the decision of these cases. Hence the object of the Legislature asked, was *primarily* to relieve the Homestead of this leading restriction, arising from the inability of the State Constitution to impair the obligation of contracts, which could not be affirmed of Congress in the express grant to it of the power to establish a uniform system of Bankruptcy. which, we have seen, necessarily involved the dissolution of contracts. But, it seems, in the progress of affairs, a *secondary* blow was directed at Section 3, of Article XI, of the Constitution, which, by the phrase, "*other security thereon*," was held by this Court to embrace liens of judgments or executions thereby made paramount to the claim of Homestead. This recital enables us to account for the remarkable and irregular character of this late act. So far as it undertakes to declare "the true intent and meaning of the act of June," I supposed it to be without a precedent, save in the ancient parliaments of England, when it became necessary to declare what was the common or unwritten law of the realm. I have not seen, nor have I been referred to any similar *declaratory* act of Congress. But I am indebted to the industrious researches of Mr. Bourdin, of counsel for the creditors, for an instance of such a declaratory act in New York, which came under review in the case of *The People vs. The Board of Supervisors of New York*, (16 New York Repts., 425); and in which it was held that it was ineffectual in regard to the interpretation of prior acts, "because the Legislature had no judicial authority, and could not control the Courts in respect to the construction of statutes in cases arising before the declaratory statute."

If this declaration of the act was designed to *persuade* the Court to a different interpretation, it could not override the clear words of the statute, or impose upon the Court a meaning at war with the true extent of Homestead, and the express subordination of Homestead to judgment liens in the Constitution itself; if designed to reprove the Court for an alleged misconstruction of law, it escaped challenge and examination, and is without just authority, and, in either aspect, wholly nugatory and inoperative. Hence, I feel warranted to discard from this act its mere "*declarations*," and to look only to its enactments. It has these clear terms of enactment, namely: "That the exemptions allowed the bankrupt by the said amendatory act shall be the amount allowed by the Constitution and laws of each State respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption of such State Constitution and laws, as well as those contracted after the same; and against liens by judgments or decrees of any State Court, any decision of any such Court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding." The addition to the law as it stood amended on June 8, 1872, consists in this provision, that "these exemptions be valid against debts contracted *before* the adoption of such State Constitution and laws, and against liens by judgment or decree of any State Court in spite of any decision of any such State Court, rendered since the adoption of such Constitution, and passage of such laws."

If we put together these several amendments, and read them as one law, it will conduce to a clearer understanding of these separate provisions. The exemption, therefore, in the fifth clause of the first proviso of the 14th section of the original act should now read as follows: "And such other property not included in the foregoing exemptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year 1871; and that these exemptions shall be the amount allowed by the Constitution and laws of

each State respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption of such State Constitution and laws as well as those contracted after the same, and against liens by judgment or decree of any State Court, any decision of any such Court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding."

This presentation of these several amendments in one body, seems to me to show conclusively that this grant is emphatically of a *State exemption*, freed by Congress of certain enumerated restrictions, and to be administered by the Court in strict conformity with the Constitution and laws creating it. It is by no means confined to the grant of a specific *amount*, as has been urged in argument; but it confers the State Homestead to that *amount* and we must look to the State Constitution and laws to regulate and limit it. This is most conducive to the ends designed; most beneficial to the parties to be relieved, and most expedient on grounds of public policy. Hence, I have concluded to carry out the provisions of the Homestead according to the Constitution, and the Homestead Acts, where they do not conflict with it. But it is argued that these acts of the Assembly abridge the Homestead in the limitations they impose upon the estate of the claimant, but I am satisfied those limitations fairly set out and represent the Homestead, which the head of a family is entitled by the Constitution "*to hold for the benefit of himself and his family.*" In this matter, therefore, I feel free to follow in the settlement of the Homestead, when claimed, the 8th sec. of the act approved June 27, 1870, (Sess. Acts 1869-70, 201.) Where, however, the Homestead Act shall be deemed by me, in the absence of any decision on the subject by the Supreme Court of Appeals of the State, to be in conflict with the Constitution, I shall of course, aim to pursue the higher guide of the Constitution, and cheerfully conform to the sentence of the Court of Appeals, when rendered.

But it is an embarrassing question to decide how, and when, to apply this statute in pending cases, and when the relief should be denied. The general principles of jurisprudence demand that a law, though remedial, should *speak for the future*; and should have no retroactive effect unless its terms should plainly require it. There is no pretence that this particular statute is otherwise than *prospective* in its character. It can not, therefore, in this application, be allowed to change or disturb vested rights, but the relief it gives can only be dispensed in pending cases where no such effects follow. In the case of *The United States vs. Schooner Peggy* (1 Cr., 103), even in the appellate Court a judgment, though rightful when rendered, was set aside to conform to later and existing laws; but it was insisted "that in mere private cases between individuals the Court will, and ought to, struggle hard against a construction which will, by retrospective operation, affect the rights of parties." I concede the principle, therefore, that I can only give effect to this bounty of Congress in pending cases, where it will not change the vested rights of parties, and then only in furtherance of the remedy, and in cure of the mischief which gave rise to the statute. (Kent's Com., 455; Potter's Dwarria, 163.) The mischief had been in Virginia, that the bankrupt could not get his exemption against debts contracted before the Constitution went into operation; nor take it against liens of judgments and decrees. The act of March 3, 1873, was designed to cure this evil. But in what cases did it cure it? Certainly in all cases commenced after the date of the act, but in none, it is argued, commenced one day before that date. Hence results the injurious anomaly that in two proceedings, one begun in last February, and the other on 4th March last, where in point of fact the rights of parties and the subjects of litigation were alike at the disposal and under the control of the Court, the former would be denied and the latter would be allowed his homestead. Cruel and discordant as the practice would be upon such an

arbitrary test, it is claimed that it follows from a fundamental principle of the bankrupt law, in sec. 14, which makes the assignment relate back to the commencement of proceedings in bankruptcy, and vests the title, by operation of law, to all the bankrupt's property and estate, real and personal, in the assignee, subject to the exceptions thereafter specified. But observe, that exempted articles are expressly saved from the vesting by virtue of said deed of assignment.

But to remove all doubt upon the subject, it is expressly provided "that the foregoing exception shall operate as a limitation upon the consequence of the property of the bankrupt to his assignees. And in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." What is this but to declare by law that these exemptions, present or future, whenever allowable without disturbing rights of parties, shall be taken as limitations upon the deed of assignment; and to interdict the use of any provision of this act, including the title of the assignee, to impair or affect the bankrupt's rights of exemption? So far, then, as these exemptions can be allowed in pending cases by the property or fund being in the custody or under the control of the Court, they are guarded with peculiar sanctity, and can not be defeated by the title of the assignee. That title—that claim of vested right—must, under all circumstances, and in every stage of the proceeding, yield to this paramount claim of exemption. The 14th section must be taken and construed as a whole, and all its parts made to consist one with the other. If so, it follows with irresistible force that there can be at no time any vesting of title in assignee so as to defeat these exemptions. This view of the act, therefore, removes out of our way this narrow and inconvenient and injurious rule of construction, which assumes the passage of the act as the date to determine the validity or invalidity of claims of homestead. I am happy to be able to invoke the language of the law against this harsh, inflexible, and unreasonable rule. I prefer the more liberal rule, which requires me to dispense this bounty of Congress wherever I can do it without incurring the blame of interfering with the absolute vested rights of parties. I can not think Congress intended to exclude from the numberless cases already pending at the passing of this law this measure of relief where no considerations of vested rights could be alleged against it, nor the means denied to the Court of satisfying the meritorious demand.

In following out this principle of determination, I have had cases of this sort arising out of the proceedings of State Courts upon creditors' bills for the sale of realty. Before, or contemporaneously with the proceedings in bankruptcy, the lands of the bankrupt have been sold, the sale confirmed, and the funds distributed; but because some of the bonds for the deferred payments were outstanding and uncollected, I have been asked for the allowance of homestead out of the proceeds of sale. I refuse it. It would be to grant the bankrupt a homestead, not out of his own property, but out of the effects of others. Again, after the bankrupt is adjudicated, his lands are about to be sold under decree of a State Court, and he applies to me for a restraining order under the allegation that he is entitled to a homestead out of the lands; I feel constrained to grant it. He has no other tribunal that can give him this relief. He is *civilius mortuus*, and all proceedings against him in the State Courts must stop, unless the assignee is authorized to intervene and proceed with them. But if there is no allegation of facts to establish a claim of homestead, or otherwise to give jurisdiction on other rightful grounds, the stay is denied and the parties left to legitimate their further proceedings by making the assignee a party with his consent and the consent of the Court, I have thought it proper to state this, my practice in vacation, by way of illustrating the principle I have assumed for my guidance.

I now proceed to the consideration of the special questions raised by the causes in

my hands. Of these, the chief is whether a discharged bankrupt can be re-admitted to petition for, and to be allowed an additional exemption granted after his discharge. Proceedings in bankruptcy are strictly statutory proceedings. They are said to present a congeries of suits in the multitude of issues they raise between the bankrupt and his various creditors. The application for a discharge is one of these suits; in it there are separate pleadings and distinct issues. It is the final object of the bankrupt; and hence the acts and the forms devised by the Supreme Court to carry it into effect furnish the mode and many precautions for the formal trial, if need be, by jury, of the bankrupt's right to a discharge. When opposed it becomes a *lis contestata* of great interest to the parties, and when obtained a great boon to the bankrupt. It procures a release from his debts, with certain exceptions, and can be pleaded as a full and complete bar against all suits brought on such debts; whereupon his certificate shall be conclusive evidence of the fact and regularity of the discharge. Before he asks for his discharge he has received his exemption; upon what terms, therefore, is he to be understood as leaving the Court? Upon the abandonment of his assets to the administration of the Court with no other claim save to any surplus beyond the satisfaction of his debts. He departs from the jurisdiction of the Court with the single condition that any creditor, &c., may, within two years, contest the validity of his discharge on the single ground of fraud. I do not perceive, therefore, how he can acquire a *locus standi* in this Court to ask for an exemption not existing at the time of his discharge. For these reasons I am of opinion that the petitions of W. W. Kean, discharged 17th September, 1869; of Wm. Rison, discharged 16th September, 1869; of Decatur Jones, discharged 29th November, 1869; and of A. G. Lewis, discharged 23d of March, 1870, should be dismissed at their respective costs.

Where the bankrupt is yet before the Court, in cases commenced before the last act, his claim to homestead depends upon the existence of an *unappropriated fund*, out of which it can be satisfied without the infringement of rights vested in others by decree or otherwise. It is not necessary that the property should remain in specie; a mere sale, unaccompanied with a pledge of the proceeds prior to the passage of the act, will not defeat this provision; especially is this the case where the claimant, waiving his allotment in kind, elects to take it out of the proceeds of sale. In cases instituted after 8th June, 1872, the right is clear to the homestead as against debts contracted after the Constitution went into operation, and in those brought after 3d March, 1873, it is relieved of this restriction, and is moreover good against the liens of judgments and decrees. The grant in such cases follows as a matter of course upon following the steps I have prescribed. In the spirit of the Constitution and the law, I accord to the claimant the selection of his homestead; his assignee has nothing to do with it. When made, I require his assignee to report to me, whether it be excessive or not in value; that report to be in the Clerk's office for thirty days for exceptions; and if there be none, to stand confirmed unless good cause be shown to the contrary. But if the assignee should report the allotment excessive, or express any doubt about it, or if any creditor should desire it, I shall proceed by way of appraisement as directed by the homestead law of the State. Should the claimant select money or personal property for his homestead, he will be expected to indicate the mode in which it shall be preserved or invested for the use of himself or family, as a homestead provision, subject to the limitations of the State law. In this way, I think, this act may be carried into effect with great advantage to our impoverished families; and without other injury to creditors than what is incident to bankrupt laws. I am informed our exemptions are by no means as great as those of many other States.

I need not specially apply the doctrines I have stated and the test I have chosen to the various other cases in my hands, but leave counsel to do so in their respective

cases, and submit to me their drafts of decrees in conformity with this opinion. Should there be doubt in any case as to what category it falls under, it may be reserved for argument and decision upon its special circumstances. But I presume I shall be so understood by counsel as to enable them to agree upon their decrees, and the steps they may take for the revision of my judgment, and the correction of the errors into which I may have fallen. I am sensible of the novelty and difficulty of some of these questions, and of the importance of their being settled by a higher Court. I shall, therefore, be gratified if counsel shall invoke the decision of the Circuit Court upon these points.

RIVER, J.

Counsel for Claimants—Thomas S. Flournoy and Charles Dabney.

For Creditors—E. E. Boulden, James M. Whittle, and W. W. Henry.

BOOK NOTICES.

An Index of the Cases Overruled, Reversed, Denied, Doubted, Modified, Limited, Explained, and Distinguished, by the Courts of America, England and Ireland, from the earliest period to the present time. By MELVILLE M. BIGELOW, author of the *Law of Estoppel*, etc. Boston: Little, Brown & Co., 1873.

We noticed when it first appeared the able and much needed work of Mr. Bigelow on the Law of Estoppel. We found therein evidence of the industry of the author in the collection of authorities, analytic ability in the treatment of the subject, and judgment in the deduction of the principles upon which the decisions were made to rest. In his present work, these qualities again appear as far as the character of the compilation will permit. The profession are under great obligation to him for his devotion to a work of practical utility of so much time and ability, which he has heretofore shown himself capable of employing in the line of original search, with credit to himself and advantage to legal literature.

The immense labor required in this new work may be gathered from the fact that there are about twenty thousand cases cited as having been, either wholly or on some one or more points, overruled, modified or explained "All the reports," says the author in his preface, "American and foreign, have been examined, and, for the most part, page by page." We have, by means of some of our own notes of such cases, tested the accuracy of the references, and have found them, so far as our memoranda goes, substantially correct.

The utility of such a work is most obvious. In the multiplicity of law reports it is easy for an industrious man to find a precedent somewhere on almost any side of any point of law not altogether free from doubt. This is a daily increasing evil. Mere plodding labor will take the place of discriminating intellect, of precedent is all that is required to control decisions. But the very fact of discordancy in the decisions will compel the Courts to rely less upon precedent and more upon principle. The rule of the civil law will prevail over the rule of the common law. To enable the Judges to find out the conflicting decisions, and ascertain and weigh the reasons upon which they are made to rest, some such work as the one before us is indispensable. It will be easy to find whether the precedent relied on has been reviewed by the Courts, and the grounds of such review. The question must, in such cases, depend upon the weight of the reasoning used in deducing conclusions, and not upon the mere fact that such and such conclusions had been previously reached by former Courts.

In this view we cordially recommend Mr. Bigelow's work to the profession, and especially to the occupants of the bench. Let us have sound reasons for legal decisions, and not precedents alone, cited simply because they are precedents.

Before concluding, we must specially call attention to the fact that the author has frequently referred to cases in which the conclusions of some of our most distinguished legal text writers, as laid down in their treatises or commentaries, have been either denied, qualified, or doubted. Instances of such references will be found under the names of Abbott, Greenleaf, Kent, Story, Parsons, etc. This is a very important and useful addition to the general plan. Our Courts are too often inclined to rest

their decisions upon the mere dicta of text writers, without looking carefully into the cases cited in support, or sifting the reasons given. It is enough that a distinguished writer has laid down the law in a given way. Here again, the effect will be to induce the Courts to rely less upon mere authority and more upon reason and principle. And anything which leads to such a result can not but be desirable.

Cocke's Common and Civil Law Practice in the United States Courts. A Treatise on the Common and Civil Law as embraced in the Jurisprudence of the United States. By WM. ARCHER COCKE, author of "The Constitutional History of the United States." New York: Baker, Voorhis & Co, publishers, 66 Nassau street.

We have set forth, first, the title upon the back, and then that upon the title-page of this book. It will strike the reader at the outset that the two are by no means equivalent. The former promises a work defining the extent to which, in the law of remedy—the practice—of the Federal tribunals, the modes of the two systems mentioned in the title respectively obtain. The latter promises an analysis either of the jurisprudence of the Union as contradistinguished from that of the States, or of American jurisprudence generally, in respect to the extent to which the common and civil law, respectively, prevail in its composition. Collating the two titles, makes it probable that by the term, "jurisprudence of the United States," that specially of the Union is intended. This is confirmed by the "Preface," where, after a few loose, general remarks about the common and civil law, the author announces it as his purpose "to draw the attention of the jurist of the country to the constantly increasing influence of the civil law in our National Courts." Proceeding, next, to the "Introduction," we are thrown into perplexity as to what aim the writer has proposed to himself. In his opening sentence he says: "In the following essay I have endeavored to illustrate the fundamental importance of the civil law, in reference to a full and clear understanding of the principles of equity jurisprudence." Upon page 11: "Among the interesting points discussed in this essay are the principles of the civil law as they exist in the jurisprudence of the United States; while that of the States, under their separate and distinct governments, in nearly every instance is based upon the common law," &c. But, on page 17: "I have also undertaken to discuss some of the analogies of the common and civil law, and shown by the history of each how these two great streams of law often intermingled in American jurisprudence."

It is obvious enough from these brief extracts that the writer has had no distinct aim. Sometimes the practice of the Federal tribunals, sometimes the special jurisprudence of the Union, sometimes the jurisprudence of the United States in the sense of American jurisprudence generally, and sometimes something else has been uppermost in his mind. He must, however, of course, have, for the most part, understood himself as confined to a survey of the special jurisprudence of the Union. This may be considered as consisting, first, of questions arising under the Constitution and laws of the Union, with respect to which the ultimate decision lies with the Supreme Court of the United States; secondly, of such portions of the law as are administered exclusively by the Federal tribunals, such as the law of admiralty, patent rights, &c; and thirdly, of those branches of law where the Federal, though exercising jurisdiction concurrently with the State tribunals, yet act independently of State decisions, as in equity, and in those departments of law such as the law of negotiable paper, where general principles are administered uniformly throughout the country.

Now a work upon the extent to which the *practice* of the common and civil law, respectively, is administered in the Federal Courts, would, of course, credit the ad-

miralty and equity practice to the civil law. As to the practice in suits at law, this, under the process acts of Congress, would follow the practice of the Courts of the States where the Federal tribunals might sit, respectively. Where the common law process obtains, the Federal Court practice would be at common law; where the practice was by petition and answer, it would follow the course of the civil law. Our author has evidently gone into no such inquiry as this subject would involve.

An investigation into the extent to which the common and civil law, respectively, enter into the composition of the special jurisprudence of the Union, opens up a large field, assuredly. Here, again, we must, at the outset, credit the greater part of admiralty and equity to the civil law. Constitutional law can not be said to belong to either system, involving simply the construction of the Constitution, &c.—the interlacing of the State and Federal fibers in the fabric of our American system. As to the "law," considered apart from equity and admiralty, the inquiry to what extent this has been from the earliest times tinctured with the civil law, presents of itself a work of great magnitude. Assuredly our author has attempted nothing of this kind.

Doubtless, from the authoritative tone in which he speaks of the principles of the civil law, the writer has quaffed deeply therefrom, but from the evidence deducible from his treatise itself, it could not be ascertained that he had ever read a page of any civil law treatise. What, then, has he attempted? Let the following brief synopsis of his work answer:

Chapter I contains some extremely general observations upon the common and civil law systems, such as any one might make after reading Blackstone's or Kent's Commentaries. Chapter II discusses the question whether the United States Courts possess any criminal jurisdiction at common law, a question long since settled in the negative. Chapter III, entitled, "Admiralty and Maritime Law," runs into a discussion of the questions whether, in criminal cases, the jury are judges of the law as well as of the fact, and whether Art. V, Amendments Constitution U. S., precludes new trials in criminal cases, and has little to say about anything else. Chapter IV, upon "Suits" generally, discusses almost exclusively the jurisdiction of the United States Courts in admiralty. Chapter V, entitled, "Influence of the Civil over the Common Law," consists of some general and loose observations upon the indebtedness to the civil law of the equity jurisprudence of England, the policy of administering law and equity by one tribunal, and the manner in which equity jurisdiction grew out of the imperfections of the common law—observations which may be found much better set forth in any of the standard treatises upon equity. Chapter VI, entitled, "The Influence of the Conflict of Laws on the Common Law," consists of some vague remarks upon the obligations of this branch of jurisprudence—the conflict of laws—to the civil law; informs us that "Story, Kent, Wheaton, and Livermore, all American writers, have done more in modern times to develop this great system than all the continental writers, where, too, the doctrine had been in daily application for centuries;" descants a little about the *lex loci contractus* and the *lex fori*; a little about the lien of judgments; a little about the law of guaranty with reference to the necessity of notice to the guarantor; and then the chapter runs into a discussion of the appellate jurisdiction of the United States Supreme Court, the principle that the Court, State or Federal, which first obtains possession of property can not be ousted of its possession by process of the other (a matter having no connection with the doctrines governing cases of conflicts of laws, arising frequently between Courts both under the same jurisdiction), and the enlargement of Federal jurisdiction brought about by the war, &c. Chapter VII, entitled, "Legislation and jurisprudence," as might by this time be expected, has little, if any, bearing upon the subject suggested by the title, consisting mainly of a discussion as to the

constitutionality of the recent amendments to the Constitution of the United States, and the manner in which the question should be treated by the Supreme Court if raised before it. Something is also said as to the concurrent jurisdiction in certain cases of the States and the Union, and the confusion of jurisdiction over certain crimes created by the Enforcement Acts. This winds up the volume.

We have never perused a law book written with less unity of purpose. If condensed by an intellectual screw press, the solid bulk of the work would be exceedingly small. The style is characterized by the same looseness and want of precision which pervade the matter. What will be thought of such an inaccuracy as this (see page 165): "At as early a period as the year 1805, the Supreme Court of the United States decided that Congress cannot confer on the National Courts any original jurisdiction." In support of this astounding assertion reference is made to *Marbury v. Madison*, 1 Cranch., 137, which shows that what was, or should have been, intended, was that Congress could not enlarge the original jurisdiction of the Supreme Court.

We can say absolutely nothing in commendation of this book. It puts us in mind of Dr. Johnson's comment upon a leg of mutton of which he once partook, of which he said that it was ill fed, ill kept, ill killed, ill cooked, ill dressed, ill seasoned, and ill served.

A Treatise on Facts as Subject of Inquiry by a Jury. By JAMES RAM, Barrister at Law. Third American Edition: By JOHN TOWNSHEND, Counsellor at Law. Baker, Voorhis & Co., Publishers, New York.

Although this work has long been recognized as a standard authority upon the subject of which it treats, its merits entitled it to far more than ordinary notice at our hands. The subject in itself of such importance, is by the author handled with the rare tact and skill of a thorough master of this branch of jurisprudence, and yet with the grace and elegance of an accomplished *litterateur*. From writers on legal subjects we ordinarily anticipate a dry rehearsal of established principles, sustained by reference only to the long records of judicial decisions. But, in this work, Mr. Ram, has pursued a plan at once original and pleasing. To copious erudition and accurate investigation, united clearness of expression, and aptness of illustration. To those outside the legal profession, to those who have never studied the applications of legal principles to established facts, nor witnessed, in the Court room, the gladiatorial sword-play between counsel and witness, a "Treatise on Facts," might appear the very embodiment of uselessness. Perchance, even some of the profession would, from such a source, anticipate naught else than insignificant truisms and dreary platitudes. Such a misconception of the dignity of the subject can arise only from inattention to what is, in the preface to the work, so aptly denominated "The Philosophy of Evidence." Works on the law of evidence may treat of long established legal principles, yet they frequently fail to investigate the origin of the knowledge of those facts, whose importance, as an element of judicial decision, they so freely discuss. To a correct and thorough understanding of the law of evidence, we deem a critical investigation of the sources and means of knowledge a most valuable assistant, if not an absolute necessity. This work of Mr. Ram may, therefore, be well considered as a valuable compliment to the learned treatises of Phillips, Starkie and Greenleaf, or, rather, as an appropriate preliminary to the study of those authors.

In the investigation of the source of the knowledge of facts, Mr. Ram first treats of the "perception" of external objects and sounds, next of the "impression thereby produced, and, lastly, of the "reproduction" of such impressions for the benefit of

others. In the amplification of these several divisions, he discusses the various grades of perceptive power, the manner in which impressions are produced or effaced, and the fidelity or inaccuracy with which they are reproduced, all of these variances being shown to be largely dependent upon the different capacities of the subjects perceiving. The original analysis needs no commendation for correctness, and the illustrations of the various propositions, while oftentimes singular, are, nevertheless, appropriate and pleasing. The author calls to his aid his varied and extensive acquaintance, not only with the tedious annals of the law, also with the more pleasing records of civil history, and the charming lyres and stirring dreams of poetry. From these materials, rich, rare and attractive, the author makes of his page a charming mosaic, affording to eye and mind a grateful relief after the tedium and monotony attending much legal literature.

Subjoined to the discussion of "The Philosophy of Evidence," is a practical application of the principles laid down, in treating of the "probability" of the correctness of inference from proven facts, of the "Credit of Witnesses," and of "Conclusions from Facts." These dissertations, in themselves interesting, are agreeably diversified by remarkable "instances" culled from the history of celebrated trials, and from the biographies of such noted advocates as Erskine, Curran, O'Connell and others.

The chapter on Advocacy is marked by ability of the highest order. To a discussion of the "ethics" of law, it adds practical suggestions of substantial value, and, while counteracting and exposing the fallacy of popular prejudice, is a graceful, yet modest, tribute to the honor of the high-toned advocate.

The "Appendix" is, by no means, the least valuable or attractive portion of the work, in itself constituting a manual for the guidance of the inexperienced practitioner. It contains David Paul Brown's "Golden Rules for the Examination of Witnesses," abridgment of Mr. Cox's valuable treatises on this last-named subject, and on the "Opening of a Case to the jury," Hoffman's "Fifty Resolutions in regard, to Professional Deportment, and a number of Interesting Cases of Mistaken Personal Identity."

Upon the whole, we can cheerfully recommend the work to the profession as being not only, from the correctness of its doctrines, and the clearness of their expression a valuable adjunct in practice, but also, from the originality of its conception and attractiveness of structure, an agreeable relief after the dryness and monotony attending much of the literature of the law.

Kerr on Fraud and Mistake. By WILLIAM WILLIAMSON KERR, of Lincoln's Inn, Barrister at Law, with notes to American Cases, by Orlando F. Bump, Counsellor at Law. Baker, Voorhis & Co., N. Y.

This is a work of 456 pages, based upon the English decisions, with foot notes added by the American author, containing brief comments on the text and full references to American decisions. It comprises that interesting and important department of law in which legal and ethical principles are so intimately blended and which constitutes the chief source of equity jurisdiction. The work opens with the subject of fraud, and after a few pages of "General Considerations," it takes up successively the specific subjects of misrepresentation and concealment, presumptions of fraud arising from the inequality of the parties and inadequacy of consideration, fraud upon third parties, miscellaneous frauds, how the right to relief may be lost, remedies, pleading, parties and proof. It concludes with a chapter on mistakes. The work

treats of an immense variety of questions arising under these heads, and seems to have exhausted all the English decisions which come within the perview of its subject. If we have any criticism at all to offer, it is upon that feature possessed by too many of our legal works and especially those by English authors. We allude to that timid reliance upon adjudicated cases which prevails with those authors in whose estimation nothing is law but precedent. Such authors seem to feel unauthorized to declare the law upon any question which has not been actually decided by the courts, and their works are to too great an extent the statement in the concrete of the facts of particular cases and the manner in which they were decided. Our idea of a legal work is that it should be systematic and exhaustive; exhaustive not only of the *cases*, but of the subject of which it treats. It should, by a process of induction, endeavor to deduce general principles from the decisions, and use the application contained in the cases, if at all, only for purposes of occasional illustration. And, in our estimation, the opinion of an author who has read, analysed and classified all that has been decided upon a given subject, and has carefully thought over the whole field occupied by it, is worthy of quite as much consideration as that of a judge on the bench who is called upon to decide only an isolated question.

However, the work in question is quite an extended treatise and will prove one of great value. The fact, too, that the author had seldom chosen to venture beyond the adjudicated cases, will doubtless be regarded by many members of the profession as a merit rather than a defect. The notes of the American author, while not pretending to exhaust the American law, will prove of great value to the American lawyer. The book is written in good style, and, mechanically, is all that could be desired.

Leading and Select Cases on Trusts. With extended Abstracts of important cases; explanatory and critical Notes; and numerous citations of authorities bearing on every branch of the Law of Trusts. Also, a full Report of the Great Case of the *Chorington & Lexington Railroad Company v. Robt. B. Bowler's Heirs et al*, just decided at the Winter Term, 1873, of the Court of Appeals of Kentucky. By PETER ZINN, of the Cincinnati Bar. Robert Clarke & Co., Cincinnati.

We take pleasure in recommending this publication to the profession. The cases are well selected, and the editor's notes full and pertinent. We expect in our next issue to give a review and criticism of the opinion of the Court of Appeals of Kentucky in the great case of the *C. & L. R. R. Co. v. Bowler heirs*.

We have received the argument of Col. R. W. Woolley, of the Louisville Bar, in the case of the *Northern Bank of Kentucky v. B. J. Adams, Exr*, involving questions of International Law, but have been prevented by press of business from examining it with any degree of care. We anticipate pleasure in its perusal.

We have received from Messrs. Baker, Voorhis & Co., of New York, a copy of the second edition of Townshend on Slander and Libel. A hasty glance at its contents persuades us that it is well worthy of a more careful examination than we have been able to give to it since its reception. In the next number of the REVIEW, however, we hope to show to the profession that it is a work well meriting their approbation and patronage, and consequently we defer until then, any extended notice of its contents.

NOTES.

SWEETWATER, TENN., August 23, 1873.

Messrs. Frank T. Reid & Co., Nashville, Tenn.:

GENTLEMEN—In subscribing for the SOUTHERN LAW REVIEW I did so in the full belief that its columns were to be devoted to Southern law literature, and not to be filled with such trash and supposed law, as sustain the political party now plundering and stealing the substance of the country. When I subscribe for a legal journal coming from the North I expect nothing more than to be reminded of the fact, that in going with the South in her late struggle, I committed the odious crime of treason, but when I take a legal journal published in the South I am rather surprised at such charges against me. In the last April number of your REVIEW I find an article on the Rebellion. The most extreme measures ever entertained by the old Federal party do not go so far in favor of consolidation. In fact, it attempts to defend all the vicious measures of the Radical party growing out of the war. For such an article to come from a Southern man, and be published in a Southern Law Review, goes beyond my comprehension of what the duties of such publishers are.

Very truly,

W. L. HARRISON.

We answer the above only for the reason that we wish it distinctly understood, once for all, that the SOUTHERN LAW REVIEW was never intended or designed, and will never be used, so long as the present proprietors own and control it, as an instrument to maintain and defend the political opinions of any party or section. It is a legal, not a political, periodical. Its purpose and design is, to aid in the growth and expression of legal thought and culture, and to succeed in this its columns are open to the discussion and investigation of all subjects, properly within its province, *from any and every stand-point*, only requiring in their treatment evidence of ability and care. If our correspondent will prepare an answer to the article in our April number on the Rebellion, marked by equal *legal* acumen and careful thought and study, we assure him it will give us great pleasure to lay it before our readers. We refuse, however, in advance, any political homily, or justification and defense of the political action of the Southern States in seeking to sever their connection with the Federal Union. He must look at the subject through "legal spectacles." This is *our* idea of how a Law Review—even a Southern one—should be conducted. There are, assuredly, enough political journals South engaged in the patriotic refrain of lugubrious miseries over the Lost Cause without our participating in the wail. We positively refuse. In fact, we are sick of all this useless and ceaseless unmanly lamentation, and verily believe that we are engaged at something more pleasant, profitable and honorable. During the war we were Confederate privates, and tried to do our duty as such. At present we are citizens of the United States, engaged in the publication of a Law Review, and shall try to do our duty equally as well in this new position.

With this number ends the second volume of the SOUTHERN LAW REVIEW. Its successful establishment as a first-class law journal has not been an easy matter, and it is with a sigh of relief that we look back and see that the worst part of the road is over. It is very true what a correspondent wrote us only a few days since that

"all the legal, medical, literary, and even theological magazines, which have attempted to struggle into existence South since the close of the late war, have been, almost invariably, 'smothered' by a studied neglect." So true is this that many are deterred from supporting a periodical published South for the only reason that they feel sure it will prove, like so many of its predecessors, short-lived. This feeling, we are certain, can no longer operate to our prejudice. The REVIEW is an assured success.

Where subscribers fail to receive their numbers they should so inform us at the earliest moment, that we may at once supply them. It works great injustice to us to write months afterwards that this or that number has never been received, and assign this as a reason why the subscription price has not been remitted earlier. We are conscious of having been at all times willing to do any and every thing that could in any view be fairly expected of us, and it is not through any fault on our part that mistakes have occurred; mistakes operating here and there seriously to our prejudice and hurt. We send a copy of each number as it comes out to every subscriber, and if any fail to receive it, it must be owing to some neglect either in the Post Office Department, or else in the party himself; it certainly is not with us. We have the right to presume, after the lapse of a reasonable time, that each subscriber has received his copy, and it is very unjust to us when under this impression, we send out our accounts to have them refused on the ground that this or that number has not been received.

During all the time that JOHN R. BRADY was on the Bench of the Common Pleas, his brother, JAMES T. BRADY, would not accept a retainer in any cause tried before that tribunal because his relative, in his capacity as Judge, might be called upon, through the channel of appeal or otherwise, to express an opinion upon the law or merits of a controversy in which Mr. Brady, as advocate, was interested.—*New York Daily Register*.

All honor to JAMES T. BRADY. Let lawyers everywhere follow his example.

Parties who wish to discontinue their subscription should so notify us at once, otherwise they will be considered as desiring it renewed.

Bound volumes of the SOUTHERN LAW REVIEW, for 1872 and 1873, for sale at this office—\$6.00 per volume, bound in calf.

Attorney's cards will be published, to occupy a space of one-half inch, two columns to the page, hereafter. Charge for the same, \$1.50 for each insertion.

C H A R T

OF THE

Southern Law Review Union.

[We refer our subscribers to Chart in the July number, with the additions and corrections given below, for information as to the names and Post-offices of our present correspondents. We are unable to give the Chart in full, for the reason that this number contains the Index and Table of Cases of Vol. 2, of the Review, and so much space is consumed thereby, that either we would be compelled to curtail our usual quantity of reading matter or else leave out the Chart. We have concluded to do the latter, as the Chart, at present, is the same as that contained in the July number, with the few exceptions given below.

We give notice that this Review is payable on receipt of first number. Subscribers not wishing to continue their subscription should notify us at once. The next (Jan.) number will be mailed to all those of our present subscribers, who fail so to notify us.]

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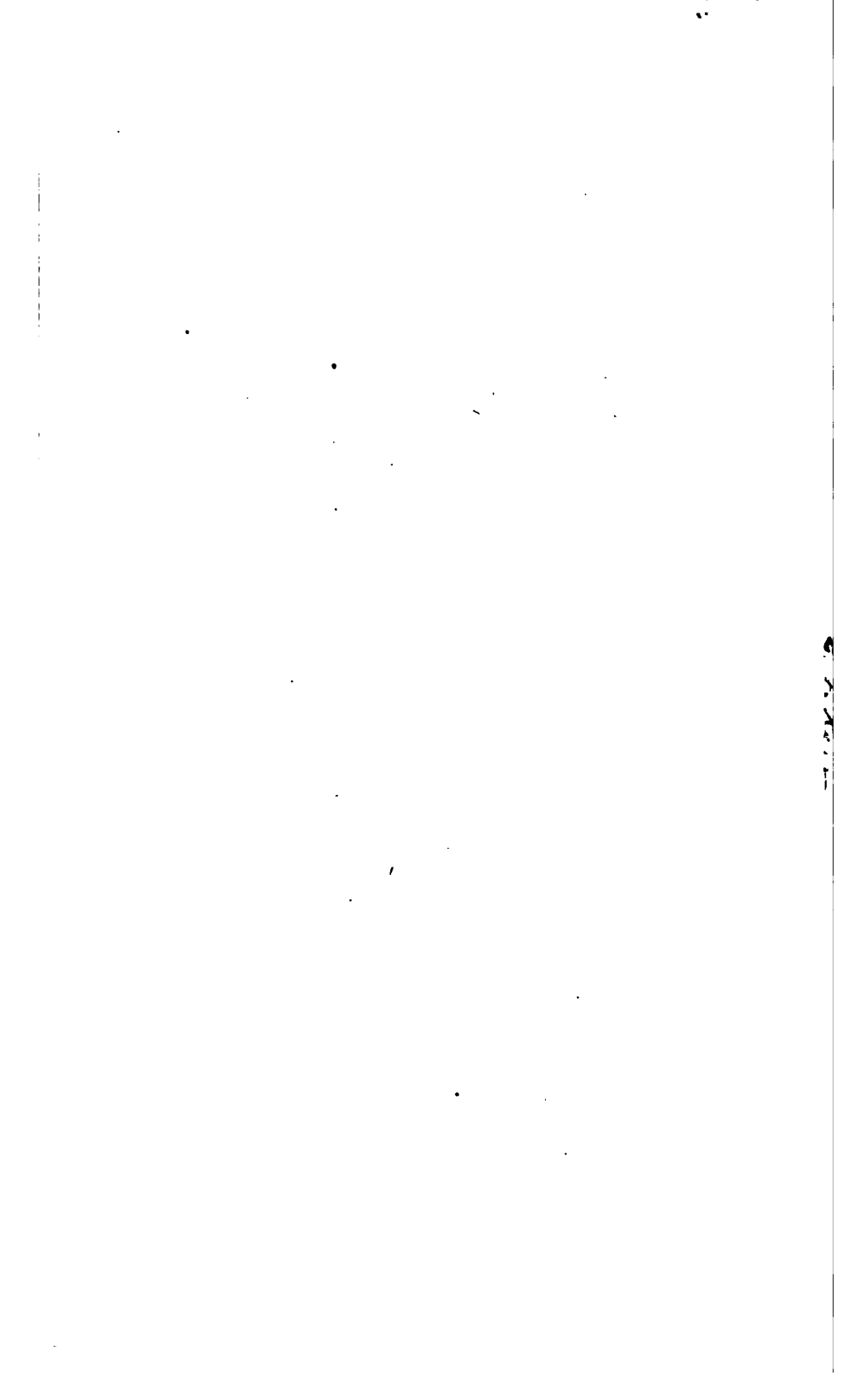
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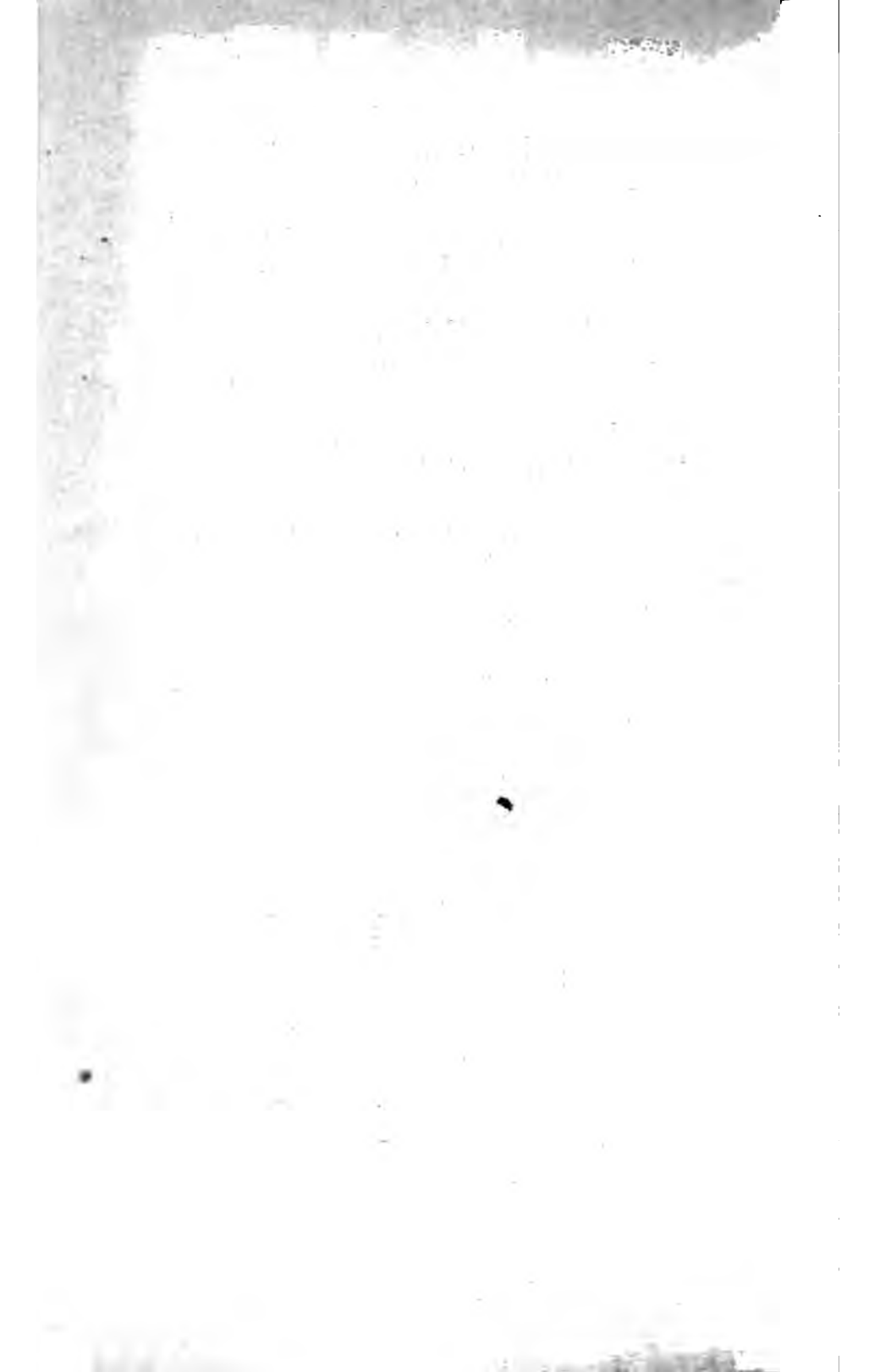
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